

# Legal Analysis of the Challenges and Prospects of the SADC Tribunal

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## CHAPTER ONE: INTRODUCTION AND BACKGROUND

### I BACKGROUND

The Southern African Development Community Treaty<sup>1</sup> established the Southern African Development Community (SADC) in Windhoek, Namibia on the 17<sup>th</sup> of August 1992<sup>2</sup>. The Treaty succeeded the then Southern African Development Coordination Conference (SADCC) which was aimed at ending dependency on the South African apartheid regime<sup>3</sup>. The new treaty embraced for the greater part, economic development goals which include; economic liberation, economic integration and development through the guarantee of democratic rights, observance of human rights and the rule of law as stipulated in its preamble.<sup>4</sup> SADC has fifteen member states and as an international organization,<sup>5</sup> it possesses legal personality with the capacity and power to enter into a contract, acquire, own or dispose of movable or immovable property and to sue and be sued.<sup>6</sup> The principles of SADC are contained in Article 4 of the Treaty, these principles includes among others; sovereign equality of all Member States; human rights, democracy and the rule of law and peaceful settlement of disputes.<sup>7</sup> The objectives of the Treaty are outlined in Article 5 and one of the objectives is to consolidate, defend and maintain democracy, peace, security and stability and in order to achieve this SADC has to create institutions that are appropriate and relevant mechanisms for the mobilization of necessary resources for the implementation of the programs and operations of SADC and its institutions.<sup>8</sup> Furthermore, there is a general undertaking by Member States to take all necessary steps to accord this Treaty the force of national law and to co-

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<sup>1</sup> Southern African Development Community (SADC) Treaty (hereafter 'SADC Treaty').

<sup>2</sup> Article 2(1) SADC Treaty.

<sup>3</sup> SADC 'Towards Common Future', available at <http://www.sadc.int/about-sadc/overview/history-and-treaty/>, accessed 8 of October 2013.

<sup>4</sup> Some of these objectives are set out in art 5 (a)-(k) SADC Treaty.

<sup>5</sup> Article 3(1) SADC Treaty.

<sup>6</sup> Ibid.

<sup>7</sup> Article 4(a)-(e) SADC Treaty.

<sup>8</sup> Article 5(2) (c) SADC Treaty.

operate with and assist institutions of SADC in the performance of their duties<sup>9</sup> with the main aim being to attain regional and economic integration.

The SADC region has been established pursuant to the African Union's continental goal of integration and economic growth. The EAC Treaty provides that the African Economic Community (AEC) shall be established through the coordination, harmonisation and progressive integration of the activities of the Regional Economic Communities (RECs).<sup>10</sup> The AEC Treaty does not make reference to the status of the RECs, but be that as it may, most commentators of African integration assumes that the RECs are the 'building blocks' of the agenda of economic integration in Africa.<sup>11</sup> Furthermore, the AEC Treaty provides that Member States 'shall foster cooperative arrangements with other regional and international organisations whose activities have a bearing on the objectives of the Treaty'. Therefore, SADC as one of Africa's sub-regional organizations drives progressively towards this goal. The SADC Treaty contains details on its relationship with the AEC apart from a reference to cooperation with regional and international organizations.<sup>12</sup> More so, the AEC makes it clear in stating that the AEC is an 'integral part', of the African Union.<sup>13</sup> The Constitutive Act of the African Union (CAAU) further provides that its provisions take precedence over and supersede any inconsistency or contrary provisions of the AEC Treaty.<sup>14</sup> This reference creates an organic relationship between the SADC, AU and the AEC.

Against this background the Abuja Treaty demonstrated its desire to promote regional communities as it provides that, '... Member States undertake to strengthen the existing regional economic communities and to establish new communities where they do not exist in order to ensure the gradual establishment of the

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<sup>9</sup> Article 6(1) SADC Treaty.

<sup>10</sup> Article 2(1) African Economic Community Treaty (AEC Treaty).

<sup>11</sup> R Oppong *Legal Aspects of Economic Integration in Africa* (2001) 180.

<sup>12</sup> Article 24 SADC Treaty.

<sup>13</sup> Article 98(1) AEC Treaty.

<sup>14</sup> Article 33(2) AEC Treaty.

Community'.<sup>15</sup> As a result, SADC was established in the southern part of the African continent and consists of fifteen Member States.<sup>16</sup>

## II SADC Tribunal

The SADC Treaty established eight institutions<sup>17</sup> and it also caters for the creation of any other institutions when the need arises.<sup>18</sup> The Summit of Heads of State or Government is a supreme policy-making institution of SADC which consists of the Heads of State or Governments of all Member States.<sup>19</sup> Some of the major duties of the Summit is to be responsible for the overall policy direction and control of the functions of SADC;<sup>20</sup> adopt legal instruments for the implementation of the provisions of this Treaty;<sup>21</sup> to elect a chairperson and a deputy chairperson of SADC from among its members for one year on the basis of rotation<sup>22</sup> and to make decisions which shall be taken by consensus and shall be binding.<sup>23</sup> Furthermore, the Organ on Politics, Defence and Security Co-operation is another SADC institution<sup>24</sup> of which its structure, functions, powers and procedures of the Organ and other related matters shall be prescribed in a separate Protocol<sup>25</sup> and again the decisions of this organ are to be taken by consensus.<sup>26</sup>

The Council of Ministers is one of the SADC institutions<sup>27</sup> which consists of one Minister from each Member State, preferably a Minister responsible for Foreign

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<sup>15</sup> Article 28(1) AEC Treaty.

<sup>16</sup> Member states of SADC are Angola, Botswana, Democratic Republic of the Congo, Lesotho, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe

<sup>17</sup> Article 9(1) (a-h).

<sup>18</sup> Article 9(2) SADC Treaty.

<sup>19</sup> Article 10 (1) SADC Treaty.

<sup>20</sup> Article 10 (2) SADC Treaty.

<sup>21</sup> Article 10(3) SADC Treaty.

<sup>22</sup> Article 10(4) SADC Treaty.

<sup>23</sup> Article 10(9) SADC Treaty.

<sup>24</sup> Article. 9(1) (b) SADC Treaty.

<sup>25</sup> Article 10A (5) SADC Treaty.

<sup>26</sup> Article 10A (6) SADC Treaty.

<sup>27</sup> Article 9(1) (c) SADC Treaty.



or External Affairs.<sup>28</sup> The council is endowed with various important duties in the organization which includes *inter alia*, to oversee the implementation of the policies of SADC and the proper execution of its programmes;<sup>29</sup> advise the Summit on matters of overall policy and ensure efficient and harmonious functioning and development of SADC;<sup>30</sup> recommend, for approval to the Summit, the establishment of directorates, committees, other institutions and organs<sup>31</sup> as well as to develop and implement the SADC common agenda and strategic priorities.<sup>32</sup>

The Treaty also provides for the establishment of other institutions like the Integrated Committee of Ministers;<sup>33</sup> the Standing Committee of Officials;<sup>34</sup> the Secretariat<sup>35</sup> and SADC National Committees as institutions of the SADC organization.<sup>36</sup>

Furthermore, the Treaty established the SADC Tribunal.<sup>37</sup> In addition the Treaty stipulates that a Protocol to the Tribunal must provide for the “composition, powers, functions, procedures and other related matters” of the Tribunal.<sup>38</sup> Hence, the Protocol on the Tribunal and the Rules of Procedure thereof were established<sup>39</sup> on 7 August 2000. The protocol regulates the Tribunal’s composition,<sup>40</sup> the processes of appointment and also dismissal of members,<sup>41</sup> and its powers concerning legal decisions, reviews, representation, interim measures, fees and legal aid<sup>42</sup>, enforcement of decisions<sup>43</sup>, and other aspects of international law in the region.

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<sup>28</sup> Article 1(1) SADC Treaty.

<sup>29</sup> Article 11(2) (b) SADC Treaty.

<sup>30</sup> Article 11(2) (c) SADC Treaty.

<sup>31</sup> Article 11(2) (f) SADC Treaty.

<sup>32</sup> Article 11(2) (j) SADC Treaty.

<sup>33</sup> Article 9(1) (d) SADC Treaty.

<sup>34</sup> Article 9(1) (e) SADC Treaty.

<sup>35</sup> Article 9(1) (f) SADC Treaty.

<sup>36</sup> Article 9(1) (h) SADC Treaty.

<sup>37</sup> Article 9(1) (g) SADC Treaty.

<sup>38</sup> Article 16(2) SADC Treaty.

<sup>39</sup> Protocol on the Tribunal and the Rules of Procedure (SADC Protocol).

<sup>40</sup> Article 3 SADC Protocol.

<sup>41</sup> Article 4 SADC Protocol.

<sup>42</sup> Article 31 SADC Protocol.

<sup>43</sup> Article 32 SADC Protocol.

The primary purpose of the Tribunal is to ensure adherence to and the proper interpretation of the provisions of the SADC Treaty and its subsidiary instruments and to adjudicate upon such disputes as may be referred to it<sup>44</sup>. It has been pronounced by the Treaty that the Protocol to the Tribunal is an integral part of the Treaty and this distinguishes the Tribunal as playing a significant role within the region.<sup>45</sup> The basis of the Tribunal's jurisdiction lies in both the Treaty and the Protocol respectively. Article 32 of the SADC Treaty permits reference to the SADC Tribunal of '...any dispute arising from the interpretation, application or validity of Protocols or other subsidiary instruments made under this Treaty, which cannot be settled amicably'. More so, Article 16(1) of the SADC Treaty states that the Tribunal shall be constituted to ensure observance of and the appropriate interpretation of the SADC Treaty and other subsidiary instruments and to decide upon such matters as may be referred to it. Furthermore, Article 14 of the SADC Tribunal Protocol gives the SADC Tribunal jurisdiction over 'all disputes and all applications referred to it in accordance with the Treaty and this Protocol which relate to various SADC instruments. In terms of Article 15 the Tribunal has jurisdiction over legal and natural persons and member states and Article 15(2) subsequently contains an exhaustion of local remedies rule, in regard to natural persons.

The Tribunal also functions as a labour tribunal<sup>46</sup>. More so, it has an appellate function in relation, for instance, to the trade panels established in terms of Article 31(b) of the SADC Protocol on Trade<sup>47</sup>. The Tribunal also plays a role of advisory function as stipulated in Article 20 of the Tribunal Protocol. In more general terms it is conspicuous that the SADC Tribunal is expected to serve as a key institution in the SADC legal and institutional integration process.

On the 18<sup>th</sup> of August 2005, The Summit of Heads of State which is the Supreme Policy Institution of SADC, pursuant to Article 4(4) of the Protocol on the Tribunal, appointed the members of the Tribunal during its Summit of Heads of

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<sup>44</sup> Article 16(1) SADC Treaty.

<sup>45</sup> Article 16(2) SADC Treaty.

<sup>46</sup> Article 19 SADC Protocol.

<sup>47</sup> Article 14(b) & 20A SADC Protocol.

State and Government held in Gaborone, Botswana.<sup>48</sup> On 18 November 2005 the Tribunal was inaugurated and the judges were sworn in. The Tribunal received its first cases in 2007 among which most of them were related to labour disputes.<sup>49</sup> The *Campbell*<sup>50</sup> case was the first matter brought before the Tribunal which dealt with issues of human rights, democracy and the rule of law. The Tribunal ruled against Zimbabwe in this matter and ordered Zimbabwe to, among other things, compensate the applicants for their confiscated farms. Zimbabwe refused to comply with the decision of the Tribunal. The Tribunal referred the matter to the Summit of the Heads of States and Governments for them to impose appropriate sanctions on Zimbabwe. The summit responded by a *de facto* suspension of the Tribunal.

The suspension of the Tribunal and the refusal of Zimbabwe to enforce the Tribunal decisions indicate that the Tribunal is plagued by various problems, especially in relation to the enforcement of its decisions. Nevertheless, it is clear that the Tribunal is pivotal for the pursuit of sub-regional integration of SADC members as it constitutes an integral part of the Treaty.<sup>51</sup> Therefore, the *de facto* suspension of the Tribunal may have a negative effect on the goals of SADC to ‘...promote sustainable and equitable economic growth and socioeconomic development that will ensure poverty alleviation with the ultimate objective of its eradication, enhance the standard and quality of life of the people of Southern Africa and support the socially disadvantaged through regional integration.’<sup>52</sup> Hence, it is the primary objective of this dissertation to conduct an analysis of the various aspects of the Tribunal and its decision in the *Campbell* case in order to generate recommendations for the strengthening of this judicial institution of SADC pursuant to regional integration.

Therefore, this dissertation will consist of four parts. The first chapter is an introductory chapter. The second chapter will discuss various aspects of the Tribunal

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<sup>48</sup> O Ruppel and F Bangamwabo ‘The SADC Tribunal: a legal analysis of its mandate and role in regional integration’ (2008) Vol 8 *MONITORING REGIONAL INTEGRATION IN SOUTHERN AFRICA YEARBOOK* 179.

<sup>49</sup> Ibid.

<sup>50</sup> *Mike Campbell (Pvt) Ltd and Other v The Republic of Zimbabwe SADC (T)* Case No. 02/2007. (hereafter ‘Campbell’ ).

<sup>51</sup> Article 16(2) SADC Treaty.

<sup>52</sup> Article 5(1) (a) SADC Treaty.

comprehensively, such as the appointment of judges, jurisdiction, *locus standi* and enforcement and execution of its decisions. The third chapter will present a critical analysis of the *Campbell*<sup>53</sup> case and the outcome of the decision of the Tribunal and subsequent events that followed thereafter which includes the refusal of Zimbabwe to enforce its decision, meeting of the Summit and a subsequent *de facto* suspension of the Tribunal. This chapter will also reflect on the *Fick Case(s)*<sup>54</sup> as decided by the High Court of South Africa, Supreme Court of South Africa and later by the Constitutional Court of South Africa. This discussion will vindicate the supranational character of the Tribunal as a regional judicial institution and will reflect on its general mandate to protect human rights. The fourth chapter will focus on the Study of the Tribunal commissioned by the SADC Summit as well as the importance of the African Commission (AC) and the African Court of Human and Peoples Rights in preserving the rule of law and finally, the fifth chapter will provide recommendations and the conclusion.

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<sup>53</sup> *Campbell* op cit (n50).

<sup>54</sup> *Government of the Republic of Zimbabwe v Fick* (47945/10, 72184/10, 77881/09) [2011] ZAGPPAC 76 (6 2011). (hereafter 'Fick' ).

## CHAPTER TWO: LEGAL ANALYSIS OF THE SADC TRIBUNAL

### I INTRODUCTION

The Southern African Development Community Treaty (Treaty) provides for the establishment of the SADC Tribunal (the Tribunal) to ensure adherence to, and proper interpretation of the provisions of the SADC Treaty and its subsidiary instruments and to adjudicate upon such disputes as may be referred to it.<sup>55</sup> The Treaty also provides for the establishment of the Protocol on the Tribunal (the Protocol) that sets out the composition, powers, procedures of the Tribunal and any other related matters.<sup>56</sup> It is therefore the primary purpose of this chapter to provide a detailed legal exposition of the Tribunal in order to understand the powers, role and function of the Tribunal and its significance in strengthening the rule of law and democracy pursuant to the promotion of human rights in the context of regional integration.<sup>57</sup> Thus, this chapter will also demonstrate that the Tribunal is an important institution for the regional integration project.

#### a) The Tribunal

The Tribunal is the judicial institution of SADC, formally inaugurated in November 2005. Primarily, the Tribunal is intended to decide upon matters and disputes that arise between Member States and to ensure adherence to the SADC Treaty.<sup>58</sup> The Tribunal is mandated to apply the SADC Treaty, the Tribunal Protocol and other Protocols that form part of the Treaty and all other SADC subsidiary instruments that are adopted by the Summit, by the Council or by any other recognisable institution or organ of the Community pursuant to the Treaty or Protocols thereto.<sup>59</sup> In doing so the Tribunal should develop its own community jurisprudence with regard to

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<sup>55</sup> Article 9 SADC Treaty.

<sup>56</sup> Article 16(2) SADC Treaty.

<sup>57</sup> W Scholtz and G Ferreira 'Much Ado About Nothing? The SADC Tribunal's Quest for the Rule of Law Pursuant to Regional Integration' (2011) Vol 1 *HEIDELBERG INTERNATIONAL LAW JOURNAL* 331-358.

<sup>58</sup> Article 9 & 16 SADC Treaty.

<sup>59</sup> Article 21(a) SADC Protocol.

applicable Treaties, general principles and rules of public international law and any rules and principles of the law of Member States.<sup>60</sup>

More so, it is important to note that the Tribunal is only restricted to questions of SADC law and that its rulings are central to the interpretation and application of SADC norms, and not national laws of Member States.<sup>61</sup> Thus the SADC Tribunal has no power to make determinations on national laws or to review the decisions of domestic courts as ‘law’.<sup>62</sup> Be that as it may, it is true that the Tribunal may adjudicate national laws and decisions of domestic courts based on those laws in a matter involving a natural or legal person brought before the Tribunal on the condition that such an individual has exhausted all available domestic remedies.<sup>63</sup> In terms of Art 16(2) the Tribunal forms an integral part of the Treaty.<sup>64</sup> A descriptive outline of the Tribunal is instructive at this stage.

*(i) Composition of the Tribunal and appointment of Judges*

The protocol provides for the composition and qualification of the judges of the Tribunal. The Tribunal shall be made up of not less than ten members who are appointed by member states but who also possess the qualifications required for appointment to the highest judicial positions in their respective states or who are jurists of recognized competence.<sup>65</sup> The Tribunal shall be constituted by three Members; provided that the Tribunal may decide to constitute a full bench composed of five members<sup>66</sup> and no two or more members may, at any time, be nationals of the same state.

*(ii) Jurisdiction of the Tribunal*

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<sup>60</sup> Article 21(b) SADC Protocol.

<sup>61</sup> Article 14 (b) SADC Protocol.

<sup>62</sup> Lorand Bartels ‘*Review of the Role, Responsibilities and Terms of Reference of the SADC Tribunal*’, Draft Report 18. ( hereafter ‘Bartels’)

<sup>63</sup> Article 15(2) SADC Protocol.

<sup>64</sup> Article 16(2) SADC Treaty.

<sup>65</sup> Article 3(1) SADC Protocol.

<sup>66</sup> Article 3(3) SADC Protocol.

The basis of the Tribunal's jurisdiction lies in both the Treaty and Part III of the Protocol respectively. Article 32 of the SADC Treaty states that 'Any dispute arising from the interpretation, application or validity of Protocols or other subsidiary instruments made under this Treaty, which cannot be settled amicably, shall be referred to the Tribunal'. More so, Article 16(1) of the SADC Treaty stipulates the purpose of the Tribunal and Article 14 of the SADC Tribunal Protocol, grants the SADC Tribunal jurisdiction over all disputes and all applications referred to it in accordance with the Treaty and the Protocol in relation to various SADC instruments.

More so, the Tribunal has jurisdiction on the interpretation, application or to ensure validity of the Protocols, and on all subsidiary instruments adopted within the framework of the community, and acts of the institutions of the community.<sup>67</sup> The scope of the Tribunal's jurisdiction extends over disputes between States, and between natural or legal persons and States.<sup>68</sup> No natural or legal person shall bring an action against a State unless he or she has exhausted all available remedies or is unable to proceed under domestic jurisdiction.<sup>69</sup> The Tribunal also has jurisdiction to give preliminary rulings in proceedings of any kind and between any parties before the courts or Tribunals of States.<sup>70</sup> Furthermore, the Tribunal shall have exclusive jurisdiction over all disputes between the States and the Community. Such disputes may be referred to the Tribunal either by the State concerned or by the competent institution or organ of the Community.<sup>71</sup> It also exercises exclusive jurisdiction over all disputes between the Community and its staff relating to their conditions of employment,<sup>72</sup> and it enjoys exclusive jurisdiction to give advisory opinions, which may be requested by the Summit or by the Council of the SADC organization.<sup>73</sup>

### *(iii) Legal status of the Tribunal*

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<sup>67</sup> Article 14(b) SADC Protocol.

<sup>68</sup> Article 15(1) SADC Protocol.

<sup>69</sup> Article 15(2) SADC Protocol.

<sup>70</sup> Article 16(1) SADC Protocol.

<sup>71</sup> Article 17 SADC Protocol.

<sup>72</sup> Article 19 SADC Protocol.

<sup>73</sup> Article 20 SADC Protocol.

First of all, it should be borne in mind that SADC is an international organization<sup>74</sup> and the Tribunal is an integral part of the Treaty.<sup>75</sup> This therefore means that the Tribunal is an organ of SADC and its legal status stems from the Treaty. As an international organization, SADC is endowed with legal personality and the capacity and power to enter into a contract, acquire, own or dispose of movable or immovable property and to sue and be sued.<sup>76</sup> Therefore, the Tribunal shall have such legal capacity as is necessary for the proper exercise of its functions in the territory of each Member State.<sup>77</sup>

*(iv) Decisions of the Tribunal*

The Treaty provides that decisions of the Tribunal shall be final and binding.<sup>78</sup> The SADC Tribunal issues ‘decisions’ on matters within its jurisdiction. These decisions are concerned with the interpretation of the applicable law and the application of the applicable law to the facts at issue. It follows that the SADC Tribunal has the power to make decisions as to whether a given party has violated a relevant obligation.<sup>79</sup>

More so, the Protocol provides that decisions made by the Tribunal shall be enforceable upon the parties to the dispute in respect of that particular case and enforceable within the territories of the States concerned.<sup>80</sup> The Protocol obliges all Member States and institutions of the community to take forthwith all measures necessary to ensure execution of the decisions of the Tribunal. In the Member states, the Protocol states that, the law and rules of civil procedure for the registration and enforcement of foreign judgments in force in the territory of the State in which the judgment is to be enforced, shall govern enforcement.<sup>81</sup> This is also echoed by the Treaty where it provides that Member States undertake to adopt adequate measures to promote the achievement of the objectives of SADC, and shall refrain from taking

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<sup>74</sup> Article 3(1) SADC Treaty.

<sup>75</sup> Article 16(2) SADC Treaty.

<sup>76</sup> Article 3(1) SADC Protocol.

<sup>77</sup> Article 3(2) SADC Protocol.

<sup>78</sup> Article 16(5) SADC Treaty.

<sup>79</sup> Article 16(1) SADC Protocol.

<sup>80</sup> Article 32(3) SADC Protocol.

<sup>81</sup> Article 32(1) SADC Protocol.



any measure likely to jeopardize the sustenance of its principles, the achievement of its objectives and the implementation of the provisions of this Treaty.<sup>82</sup>

First of all, it is important to identify two forms in which decisions of the Tribunal are enforced. There are two distinct types of enforcement mechanisms applicable to SADC Tribunal decisions: first, there is a mechanism for registration and enforcement of Tribunal decisions within the legal orders of the SADC Member States; secondly, there is a mechanism for enforcing decisions at the international level, by reference to the SADC Tribunal and the Summit.<sup>83</sup>

The Protocol further states that the decisions of the Tribunal shall be taken by a majority<sup>84</sup> and that it may also give a decision in default.<sup>85</sup> However, when the Tribunal is giving the decision in default, it should satisfy itself that it has jurisdiction over the dispute and that the claim is well-founded in fact and law.<sup>86</sup> Be that as it may, a party against whom a default decision is made may apply to the Tribunal for the rescission of such decision. The applicant shall set out the grounds to the satisfaction of the court for such application.<sup>87</sup>

Article 26 of the Protocol provides for the application for review of the Tribunal decision on the condition that the decision has been made by the Tribunal based upon the discovery of some fact which by its nature might have had a decisive influence on the decision if it had been known to the Tribunal at the time the decision was given, but which fact at the time was unknown to both the Tribunal and the party making the application; provided always that such ignorance was not due to negligence.

## b) Relationship between the Tribunal and the National Courts

### *(i) The role of national courts in the enforcement of decisions*

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<sup>82</sup> Article 6(1) SADC Treaty.

<sup>83</sup> Bartels op cit (n62) at 38.

<sup>84</sup> Article 24(2) SADC Protocol.

<sup>85</sup> Article 25(1) SADC Protocol.

<sup>86</sup> Article 25(2) SADC Protocol.

<sup>87</sup> Article 25(3) SADC Protocol.

The international nature of SADC equally extends to the SADC Tribunal and as such, the national courts of Member States are therefore expected to respect the Tribunal and its decisions. This is the starting point for a reflection of the role of national courts in the enforcement of decisions of the Tribunal.

It has been argued that, courts within national jurisdictions have a pivotal role to play in as far as enforcement of international rule of law is concerned and they have a potential to improve state compliance with international law.<sup>88</sup> More so, it should be clear that the development and enforcement of international law is dependent upon the condition that such decisions of the of the international courts or Tribunals are accepted and enforced by the government of the states concerned and this is when the role of domestic courts becomes relevant.<sup>89</sup> Unfortunately, it has not been the case with the Tribunal. The *Campbell*<sup>90</sup> case which the Tribunal had to preside over for the very first time, demonstrated rather a strained relationship between the Tribunal and the domestic courts. When the Tribunal ruled against Zimbabwe in which a human rights question was an issue, the Zimbabwean government refused to enforce the Tribunal's ruling. Under international law, a national court is considered to be an organ of the State, just as are the legislature and executive.<sup>91</sup> Therefore, the Tribunal, in essence, produces decisions with effect in national jurisdictions through the civil law or common law enforcement of decisions. This entails that the national courts of Member states should at least embrace and respect the decisions of the Tribunal as mandated by the Treaty. It is clear therefore that domestic courts play a pivotal role in giving effect and force of law to any decisions made by the Tribunal. It is also true that the enforcement power of the Tribunal is dependent on the domestic courts.

*(ii) The role of the Tribunal and national courts in the global network of courts.*

Another medium for enhancing community-state relations is the national courts. They provide an avenue for giving domestic effect to community law apart from

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<sup>88</sup> M Kumm 'International Law in National Courts: The International Rule of Law and the Limits of the Internationalist Model' (2003) Vol 19 *VIRGINIA JOURNAL OF INTERNATIONAL LAW* 44.

<sup>89</sup> Scholtz & Ferreira op cit (n57) at 34.

<sup>90</sup> *Campbell* op cit (n50).

<sup>91</sup> 'Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human. Rights' (1999) ICJ Rep 62, para 62.

executive and parliamentary acts such as ratifications, publications of community instruments and administrative action.<sup>92</sup> Therefore, having this much to offer, the role of national courts in the global judicial network becomes essential. The Tribunal has indicated its will to embrace and recognize what was dubbed as the ‘trans-judicial communication of courts’ by Professor Slaughter.<sup>93</sup> In formulating its decision in the *Campbell*<sup>94</sup> case, the Tribunal made reference to various international and foreign laws<sup>95</sup> in order to present itself as an actor among other global courts which pursue human rights, the rule of law and democracy. Thus, Southern African courts also have a role to play in the progressive realization of this universal goal.

The Tribunal have taken into account some of the decisions of the European Convention on Human Rights,<sup>96</sup> the African Charter on Human and Peoples’ Rights (ACHPR),<sup>97</sup> and it generously made reference to the decisions of other regional Tribunals<sup>98</sup>, national courts<sup>99</sup>, *quasi-judicial* bodies<sup>100</sup> and expert bodies<sup>101</sup>

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<sup>92</sup> Oppong op cit (n11).

<sup>93</sup> A Slaughter ‘A Global Community of Courts’ (2003) Vol 44 *HARVARD INTERNATIONAL LAW JOURNAL* 191.

<sup>94</sup> *Campbell* op cit (n50).

<sup>95</sup> See *Campbell* op cit (n50) at 17-26.

<sup>96</sup> Article 26 European Convention on Human Rights.

<sup>97</sup> *Campbell* op cit (n50) at 20.

<sup>98</sup> Citations included: *European Court of Human Rights, Golder v United Kingdom* (1975), *Philis v Greece* (1991) and the *Inter-American Court of Human Rights, Advisory Opinion OC-9/97 of 6 October 1987*.

<sup>99</sup> The Tribunal referred to the House of Lords, *Attorney-General of the Commonwealth of the Bahamas v Ryan* (1980) A.C. 718 and *Jackson v Attorney-General* UKHL 56 (2006) 1 A.C.262; the Constitutional Court of South Africa (*Zondi v MEC for Traditional and Local Government Affairs and Others* 2005 (3) SA 589 (CC) as well as the Supreme Court of Zimbabwe (*Commercial Farmers’ Union v Minister of Lands* 2001 (2) SA 925 (ZSC) and *Mike Campbell (Pty) Ltd v Minister of National Security Responsible for Land, Land Reform and Resettlement* (SC 49/07)).

<sup>100</sup> Cf. African Commission on Human and People’s Rights (*Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v Nigeria*, Comm. No. 140/94, 141/94 145/95 (1999); *Zimbabwe Human Rights NGO Forum/Zimbabwe*, Comm. No. 245 (2002), Human Rights Committee (General Comment No. 18), The African Commission on Human and People’s Rights is seen as a *quasi-judicial* body. See further, discussion: R Murray *The African Commission on Human and People’s Rights and International Law* (2000) 143, the complexity on the question whether the Human Rights Committee has *quasi-judicial* powers. See F Martin, S Schnably *International Human Rights and Humanitarian Law: Treaties, Cases and Analysis* (2006) 7. See further, J Crawford ‘The

established by UN organs.<sup>102</sup> The Tribunal also made reference to international law such as the United Nations Charter,<sup>103</sup> Universal Declaration of Human Rights,<sup>104</sup> International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights<sup>105</sup> and the Convention on the Elimination of All forms of Racial Discrimination<sup>106</sup> in which it confirmed that discrimination is prohibited.

Therefore, this form of communication within the global judicial sphere is essential for the protection of human rights as well as enriching the tribunals that enforce them with solid jurisprudence. The trans-judicial communication demonstrated by the tribunal establishes a community of courts,<sup>107</sup> including; domestic, regional and international courts, which operate on a modicum of common ground. Thus the community of courts acts pursuant to the promotion and preservation of democracy and the rule of law.<sup>108</sup> More so, this form of communication among the courts may nurture a process of ‘collective judicial deliberation on a set of common problems’.<sup>109</sup> Thus, the role of national courts may not be isolated from the global judicial communication; instead it is essential to integrate it into this system in order to ensure the protection of universal human rights on a national, regional and international level.

*(iii) The Tribunal and the objective of regional integration*

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UN Human Rights Treaty System’ P Alston and J Crawford (eds) *The Future of UN Human Rights Monitoring*, (2003) Vol 47 *JOURNAL OF AFRICAN HUMAN RIGHTS* 2.

<sup>101</sup> The Committee on Economic, Social and Cultural Rights (General Comment No.16). S Leckie ‘The Committee on Economic, Social and Cultural Rights: Catalyst for Change in a System Needing Reform’ 129-144 in P Alston and J Crawford (eds.) *The Future of UN Human Rights Monitoring (2003) Vol 47 JOURNAL OF AFRICAN HUMAN RIGHTS* 2.

<sup>102</sup> The Tribunal referred also to the decisions of other entities with authority.

<sup>103</sup> *Campbell* op cit (n50) at 45.

<sup>104</sup> *Campbell* op cit (n50) at 46.

<sup>105</sup> *Campbell* op cit (n50) at 46.

<sup>106</sup> *Campbell* op cit (n50) at 47.

<sup>107</sup> *Slaughter* op cit (n93) at 192.

<sup>108</sup> *Scholtz & Ferreira* op cit (n57) at 345.

<sup>109</sup> *Campbell* op cit (n50) at 119.

One of the major goals of the SADC is to promote an active interdependence and progressive integration of the Southern African economies of Member states, for the mutual, relevant, balanced and equitable economic development of the region.<sup>110</sup> In order to achieve this goal, the rule based community becomes a necessary component to drive the region towards regional integration. Thus, the Tribunal has a significant part in the international judicial system to protect and promote the rule of law in the region pursuant to sub-regional, and ultimately African integration.<sup>111</sup>

The SADC Treaty advocates for an independent and impartial Tribunal, which should, when executing its mandate, promote the purposes and interests of the community and not merely serve the interests of certain Member states.<sup>112</sup> Therefore, since the Tribunal is an integral part of the Treaty, ‘...Member States are encouraged to adopt adequate measures to promote the achievement of the objectives of SADC, and shall refrain from taking any measure likely to jeopardise the sustenance of its principles, the achievement of its objectives and the implementation of the provisions of this Treaty’.<sup>113</sup> It is therefore undeniable that the Tribunal, as a judicial arm of the community, plays a pivotal role in the maintenance, improvement and protection of the rule of law aimed towards the main integration goal.

### c) Sources of law for the Tribunal

The source of law for the Tribunal has been provided in the Protocol and provides that the Tribunal shall ‘apply the Treaty, the Protocol and other Protocols that form part of the Treaty, all subsidiary instruments adopted by the Summit, by the Council or by any other institution or organ of the Community pursuant to the Treaty or Protocols’,<sup>114</sup> and it has been mandated to develop and improve its own Community jurisprudence paying particular attention and regard to applicable treaties, general

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<sup>110</sup> Preamble, Treaty.

<sup>111</sup> Scholtz & Ferreira op cit (n57) at 351.

<sup>112</sup> In terms of Article 17 (1) Treaty “Member States shall respect the international character and responsibilities of SADC, the Executive Secretary and other staff of SADC, and shall not seek to influence them in the discharge of their functions”. Art. 17 (2), Treaty further reads that ‘the members of the Tribunal ... shall not seek or receive instructions from any Member States’.

<sup>113</sup> Article 6(1) SADC Treaty.

<sup>114</sup> Article 21(a) SADC Protocol.

principles and rules of public international law and any other rules and principles of the law of States.<sup>115</sup>

The Tribunal, in fact, should make reference to other international documents in order to ascertain legal position in cases where the Treaty is silent.<sup>116</sup> This provision states that; the Tribunal shall apply the Treaty, this Protocol and other Protocols that form part of the Treaty, all subsidiary instruments adopted by the Summit, by the Council or by any other institution or organ of the Community pursuant to the Treaty or Protocols; and develop its own Community jurisprudence having regard to applicable treaties, general principles and rules of public international law and any rules and principles of the law of Member States.<sup>117</sup>

Article 21<sup>118</sup> is therefore important in that it authorizes the SADC Tribunal to apply equitable principles, such as estoppel, as well as the rules of treaty law, including rules on the interpretation of treaties and this includes, importantly, the rule that treaties are to be interpreted in light of any rules relevant in international law that are applicable in the relations between the concerned parties.<sup>119</sup> Thus, the Tribunal was correct in the interpretation and application of the SADC Treaty and by giving a ruling against the on-going compulsory land grabs in Zimbabwe.

#### d) Conclusion

The Tribunal is an important judicial organ in the SADC region and as such the legal order, human rights, democracy and the rule of law within the region are to be protected and enhanced through its arm. It has been demonstrated above that there should be interplay between the Tribunal and the national courts of member states as this is crucial for the protection of human rights and the rule of law. The Tribunal has also been endowed with the power to produce decisions which are both binding and final between the parties to the dispute and also within the territories concerned. Therefore, it is clear that the Tribunal plays a pivotal role in the SADC region and also in the realisation of the integration goal. The following chapter will discuss one

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<sup>115</sup> Article 21(b) SADC Protocol.

<sup>116</sup> *Campbell* op cit (n50) at 24

<sup>117</sup> Article 21 SADC Protocol.

<sup>118</sup> SADC Protocol.

<sup>119</sup> *Bartels* op cit (n62) at 19.

of the most important cases, famously known as *Campbell*.<sup>120</sup> The Tribunal makes provision for generous standing as it includes the individual standing before the Tribunal. This provides natural persons with the locus standi before the Tribunal and this improves the rule of law and access to justice in the region.

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<sup>120</sup> *Campbell* op cit (n50).

## CHAPTER THREE: ANALYSIS OF THE CAMPBELL CASE

### I INTRODUCTION

The SADC Tribunal in the renowned *Campbell* case handed down a ruling against Zimbabwe in which it ordered the government of Zimbabwe to refrain from further expropriation of land owned by the applicants and that the government should pay compensation to those land owners who had their farms confiscated.<sup>121</sup> The government of Zimbabwe refused to comply with the Tribunal's ruling. The applicants further made an attempt to approach the Tribunal for a second<sup>122</sup> and third<sup>123</sup> time to report Zimbabwe's breach of the Tribunal's ruling. The applicants wanted the Tribunal to find that Zimbabwe was in breach of its decision by refusing to comply and enforce the decision of the Tribunal. The Tribunal found in favour of the applicants and held Zimbabwe in breach of the Tribunal's ruling. Nevertheless, Zimbabwe repeatedly refused to enforce the Tribunal's ruling.<sup>124</sup>

The Campbell case was the first case brought before the Tribunal which dealt with issues of human rights in the context of the rule of law and democracy. Therefore, it is the purpose of this chapter to analyse the case in order to grasp the various aspects of the Tribunal. Thus this chapter will discuss the case in a detailed approach and in doing so, highlight aspects of jurisdiction of the Tribunal, the right to access the Tribunal, *locus standi*, adjudication of human rights issues, and compensation in the case of expropriation, which will be discussed and analysed at a later stage. The primary purpose of this chapter therefore is to critically analyse the *Campbell* case in order to identify areas of strength and weakness of the Tribunal's enforcement mechanism and to generate recommendations to that effect.

### II The Campbell Case<sup>125</sup>

In 2002, the government of Zimbabwe strengthened its land distribution program,<sup>126</sup> and to make sure that no contention over its undertaking, it went on to legalise this

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<sup>121</sup> *Campbell* op cit (n50) at 58.

<sup>122</sup> *Mike Campbell (Pvt) Ltd v Republic of Zimbabwe* [2008] SADCT 2 at 59.

<sup>123</sup> *Mike Campbell (Pvt) Ltd v Republic of Zimbabwe* [2009] SADCT No. 3/2009

<sup>124</sup> *Campbell* op cit (n50) at 58

<sup>125</sup> Ibid.



exercise by amending its constitution to make possible compulsory acquisition of agricultural land. The acquisition of land was to be carried out under the new law, Section 16B of the Constitution of Zimbabwe (Amendment No. 17, 2005) (herein referred to as Amendment 17).<sup>127</sup> When this exercise was in progress, the applicants (most of them white commercial farmers) made an attempt, though it was in vain, to secure from the court a restraining order to prevent the compulsory confiscation of their property. This application was dismissed by the Zimbabwean Supreme court.<sup>128</sup> The Supreme Court of Zimbabwe dismissed the application reasoning *inter alia* that;

‘Section 16B of the Constitution is a legitimate exercise of the legislative power to determine the conditions under which the power inherent in the State to compulsorily acquire private property in agricultural land for public purposes can be validly exercised.’<sup>129</sup>

In other words, the Supreme Court was of the view that compulsory acquisition of land was lawful and the government is undertaking this exercise within the boundaries of the Constitution. More so, Amendment 17 has intentionally ousted the court’s jurisdiction to hear all matters which relate to the acquisition of agricultural land and it also excluded compensation.<sup>130</sup> Section 16B (3) (a) invalidates the capacity of the courts in this regard and it provides that;

‘A person having any right or interest in the land –

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<sup>126</sup> This exercise come about following a plethora of Constitutional amendments which started in early 1990’s and in 2000 the government of Zimbabwe introduced another Constitutional Amendment Act No 6 of 2000 which sought to legitimize the invasions already taking place and to expedite the land reform process. See also, M Beukes ‘Southern African events of international significance’ (2012) Vol. 37 *SOUTH AFRICAN YEARBOOK OF INTERNATIONAL LAW* 1, where events where recorded pertaining to Zimbabwe and where Tendai Biti, (the then Minister of Finance from the Movement for Democratic Change (MDC) (and secretary general of the party)) gave a warning that Zimbabwe was heading for a ‘bloodbath’ if Robert Mugabe went on with elections in 2011.

<sup>127</sup> *Campbell* op cit (n50) at 52.

<sup>128</sup> *Campbell* op cit (n122) at 59.

<sup>129</sup> *Ibid.*

<sup>130</sup> *Ibid.*

(a) Shall not apply to a court to challenge the acquisition of the land by the State, and no court shall entertain any such challenge.’<sup>131</sup>

The applicants, Campbell and other numerous white farmers in Zimbabwe who had their farms confiscated by the state, and who was left with no option and no remedy in the country, in pursuit of justice, they approached the SADC Tribunal located in Windhoek, Namibia in order to have their matter settled by the regional Tribunal.

#### a) Facts

The application made to the Tribunal<sup>132</sup> pursued among other things; to challenge the acquisition by the government of Zimbabwe of agricultural land and to seek an interim measure restricting the government of Zimbabwe from removing or allowing the removal of the applicants from their land pending the determination of the matter by the Tribunal. Furthermore, the Tribunal ordered the Respondent to pay compensation for land already expropriated by the Respondent.<sup>133</sup> The Tribunal granted the relief sought but the respondent deliberately spurned the decision made by the Tribunal.

Campbell and others who had their farms confiscated by the government argued before the Tribunal that the Zimbabwean land acquisition process was racist and contrary to Article 6 which provides that ‘SADC and Member States shall not discriminate against any person on grounds of gender, religion, political views, race, ethnic origin, culture, ill health, disability, or such other ground as may be determined by the Summit’.<sup>134</sup>

The African Union Charter to which Zimbabwe subscribes to, it also prohibits arbitrary and racially motivated government conduct.<sup>135</sup> The SADC Treaty stipulates

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<sup>131</sup> Constitution of Zimbabwe Amendment (No. 17) Act, 2005 (Act No. 5 of 2005) (Amendment 17).

<sup>132</sup> The application was made in terms of Article 28 of the Protocol on Tribunal (the Protocol), as read with Rule 61(2) – (5) of the Rules of Procedure of the SADC Tribunal (the Rules).

<sup>133</sup> *Campbell* op cit (n50) at 58.

<sup>134</sup> Article 6(2) SADC Treaty.

<sup>135</sup> Article 8(1) African Charter on Democracy, Elections and Governance; this Article provides that ‘State Parties shall eliminate all forms of discrimination, especially those based on political opinion, gender, ethnic, religious and racial grounds as well as any other form of intolerance.’

that SADC and its member states shall act in accordance with the principles of human rights, democracy and the rule of law as well as equity, balance and mutual benefit; and the peaceful settlement of disputes, among others.<sup>136</sup> The complainants argued in their application to the Tribunal, and submitted among other things;

- i. That the respondent acted in breach of its obligations under the Treaty by enacting and implementing Amendment 17; and that,
- ii. That the applicants were denied access to the courts to challenge the legality of the compulsory acquisition of their lands;<sup>137</sup>
- iii. That the Zimbabwean government acted in breach of its obligations under the Treaty of the Southern African Development Community by enacting and implementing Amendment 17;
- iv. That the responsible Minister failed to employ reasonable and objective criteria in order to establish whether the confiscated farms were reasonably necessary for resettlement purposes in conformity with the land reform programme;
- v. That the applicants were denied access to the Zimbabwean courts to challenge the legality of the compulsory acquisition of their lands;
- vi. That the applicants had suffered racial discrimination insofar as they were the only ones whose lands have been acquired under Amendment 17; and
- vii. That the applicant was denied compensation in respect of the lands acquired from them.<sup>138</sup>

The respondent, in response to the applicant's submission, made their own submission contending among other things that;

- The applicants have not been denied access to the courts. On the contrary, the applicants could, if they wish, seek judicial review.<sup>139</sup>
- The Tribunal has no jurisdiction to entertain the application under the Treaty of the Southern African Development Community;
- Land is acquired from mainly white farmers who own large tracts of land suitable for agricultural resettlement, and this policy cannot be described as racist because it is brought about by colonial history;

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<sup>136</sup> Article 4(c) SADC Treaty.

<sup>137</sup> *Campbell* op cit (n50) at 13.

<sup>138</sup> *Campbell* op cit (n50) at 12-3.

<sup>139</sup> *Ibid.*

- The respondent also acquired land from a few black Zimbabweans who possessed large tracts of land;
- The applicants will receive compensation in terms of Amendment 17;
- The compulsory acquisition of land is aimed at correcting inequities pertaining to colonially inherited land ownership; and
- The applicants have not been denied access to the Zimbabwean courts as they could seek judicial review if they wish to.

Against this background, the Tribunal formulated the issues to be determined as follows:<sup>140</sup>

- Whether or not the Tribunal has jurisdiction to entertain the application;
- Whether or not the applicants have been denied access to the courts in Zimbabwe;
- Whether or not the applicants have been discriminated against on the basis of race; and
- Whether or not compensation is payable for the land compulsorily acquired from the applicants by the respondent.

*(i) Jurisdiction*

The Tribunal's findings on jurisdiction was based on Article 4(c) of the Treaty and the Tribunal found that it has necessary jurisdiction in respect of any matter concerning human rights, democracy and the rule of law, and furthermore, the Tribunal stated it clearly that Zimbabwe cannot rely on its national law in order to circumvent its SADC Treaty obligations.<sup>141</sup> More so, Article 16(1) of the SADC Treaty provides that the primary mandate of the Tribunal is as follows; '[t]he Tribunal shall be constituted to ensure adherence to and the proper interpretation of the provisions of this Treaty and subsidiary instruments and to adjudicate upon such

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<sup>140</sup> Ibid at 16-7.

<sup>141</sup> Ibid at 25.

disputes as may be referred to it.’ Hence, the Tribunal concluded that it has the jurisdiction to entertain this matter.<sup>142</sup>

Furthermore, the SADC Tribunal was set up and entrusted with a duty to protect the interests and rights of SADC Member States and their citizens, and to develop the community jurisprudence also with regard to applicable treaties, general principles and rules of public international law.<sup>143</sup> Subject to the principle of exhaustion of local remedies, the Tribunal has the mandate to adjudicate on disputes between states, and between natural and legal persons of the Community.<sup>144</sup> In the present case, the Tribunal confirmed its jurisdiction *mero metu* and found that it had jurisdiction since the dispute in this case involves a member state and a natural and legal person.<sup>145</sup> More so, the Protocol states that the Tribunal shall have jurisdiction over all matters provided for in any other agreements that member states may conclude among themselves or within the community and that confer jurisdiction to the Tribunal. The Tribunal is also vested with exclusive jurisdiction in disputes between organs of the community or between community personnel and the community.<sup>146</sup>

The respondent argued that since the Supreme court had at that moment not delivered any judgement concerning the matter before it, the applicant cannot claim to have exhausted all local remedies or to state that he was not able to proceed under the domestic jurisdiction as required by Article 15 (2) of the Protocol to the Tribunal.<sup>147</sup> To this argument, the Tribunal responded by mentioning that the Protocol though pivotal in this respect, it is not the only instrument in the region containing the exhaustion of local remedies rule. The Tribunal made reference to the African Charter of Human and Peoples’ Rights (Banjul Charter) which states that;

‘The Commission can only deal with a matter submitted to it after making sure that all local remedies, if they exist, have been exhausted, unless it is obvious to

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<sup>142</sup> Ibid

<sup>143</sup> Article 16 SADC Treaty.

<sup>144</sup> Article 15(2) SADC Protocol.

<sup>145</sup> Ruppel & Bangamwabo op cit (n48) at 9.

<sup>146</sup> Article 18 & 19 SADC Protocol.

<sup>147</sup> *Campbell* op cit (n50) at 19.

the Commission that the procedure of achieving the remedies would have been unduly prolonged'.<sup>148</sup>

The Tribunal went on to hold that, the rationale behind this rule is to grant domestic courts an opportunity to deal with the matter first because they are best placed to rule on any matter concerning municipal law.<sup>149</sup> This rule also ensures that, the Tribunal is not burdened by matters which may easily be settled in the national courts. Be that as it may, the exhaustion of local remedies rule is qualified in so far as it is not applicable where domestic law offers no remedy or ineffective or where the procedure of getting a remedy is unduly prolonged.<sup>150</sup>

The Tribunal referred to Amendment 17<sup>151</sup> in terms of which the jurisdiction of the Zimbabwean Courts were ousted with regard to cases that concerned the acquisition of agricultural land by the government.<sup>152</sup> The Tribunal reasoned that, the applicants were not able to institute proceedings in the Zimbabwean Courts as was confirmed by the Supreme Court of Zimbabwe.<sup>153</sup> In this regard, the Tribunal concluded that it is vested with the necessary jurisdiction to entertain the matter.<sup>154</sup>

Furthermore, the applicant argued that, the Tribunal have no jurisdiction to decide on the validity of the land reform program in Zimbabwe. The argument of the respondent was based on the fact that, the Treaty does not provide standards upon which the Member States must be evaluated, but merely set up principles and objectives of SADC.<sup>155</sup> And in the absence of such standards, the Tribunal may not apply these from other international documents because such practice is equivalent to legislating on behalf of the Member State of SADC.<sup>156</sup>

The Tribunal again responded with reference to Article 21 (b) of the Protocol which does not only instructs the Tribunal to develop its own jurisprudence but also

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<sup>148</sup> Article 50 of The African Charter on Human and Peoples' Rights (ACHPR).

<sup>149</sup> *Campbell* op cit (n50) at 20.

<sup>150</sup> *Ibid.*

<sup>151</sup> Section 16B, Amendment 17.

<sup>152</sup> *Campbell* op cit (n50) at 21.

<sup>153</sup> *Campbell* op cit (n50) at 22.

<sup>154</sup> *Ibid.*

<sup>155</sup> *Campbell* op cit (n50) at 23.

<sup>156</sup> *Ibid.*

enjoins it to do so by considering other applicable Treaties and general principles of law and rules of public international law.<sup>157</sup> The Tribunal, in fact must –where the need arises, consult other international documents in order to establish a legal position concerning relevant matters where the Treaty is silent.<sup>158</sup>

The Tribunal further found it needless for the Summit to enact a Protocol on Human Rights and agrarian reform, as advised by the respondent in its submissions,<sup>159</sup> in order to give effect to the principles contained in the Treaty,<sup>160</sup> which requires Member States to act in accordance with the principles of human rights, democracy and the rule of law.<sup>161</sup> Having identified that, the Tribunal found that it has capacity and sufficient jurisdiction to preside and rule on any matter concerning human rights, rule of law and democracy which appeared to be decided in the application before the Tribunal.<sup>162</sup>

#### *(ii) Right to the Access of Courts*

The Tribunal was also called upon to determine whether the Applicants have been deprived of their right to access the courts and whether they have been denied a fair hearing due to Amendment 17.<sup>163</sup> On this question the Tribunal found that the applicants were indeed denied access to the courts and the right to a fair hearing, which are crucial elements of the rule of law, and that Section 16B (3) (a)<sup>164</sup> was in violation of Article 4 (c) of the Treaty.<sup>165</sup> Firstly, in 2007, the Supreme Court of Zimbabwe issued its decision pertaining to the constitutionality of Amendment 16A and 16B.<sup>166</sup> The Court held that, ‘the land reform is a non-justiciable political

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<sup>157</sup> *Campbell* op cit (n50) at 24.

<sup>158</sup> *Campbell* op cit (n50) at 24

<sup>159</sup> *Campbell* op cit (n50) at 23.

<sup>160</sup> Article 4(c) SADC Treaty.

<sup>161</sup> Article 4(c) SADC Treaty.

<sup>162</sup> Scholtz & Ferreira op cit (n57) at 338.

<sup>163</sup> *Campbell* op cit (n50) at 16.

<sup>164</sup> *Ibid.*

<sup>165</sup> *Ibid.*

<sup>166</sup> *Mike Campbell (Pty) Ltd v. Minister of National Security Responsible for Land, Land Reform and Resettlement* SCZ 49/07 at 8-11.

question and that the Constitution could legally deny a right to access courts to challenge land acquisitions'.<sup>167</sup> While the decision in the Supreme Court was still pending, the SADC Tribunal held that Amendment 16A and 16B violated international law because those provisions deny individuals the fundamental right to access courts and have their case heard.<sup>168</sup>

Secondly, the Treaty stipulates that the Tribunal has jurisdiction to hear cases involving individual human rights,<sup>169</sup> and it is a fact that Zimbabwe has accepted SADC Tribunal's validity by appointing one of its officials to act as a judge in the Tribunal. The Supreme Court accepted the validity of the Tribunal because it believed that the Tribunal is a legitimate judicial institution of SADC, however, the Supreme Court may not adhere to or enforce the decisions of the Tribunal if it considers such decision repugnant to public policy. As a matter of fact, the ruling of the Tribunal was against public policy in Zimbabwe because compulsory acquisition of land has become public policy covered by the land policy and this was enabled by numerous amendments to the Land Acquisition Act to accommodate the new socio-political developments. Though the processes and legal procedures relating to the land policy in Zimbabwe are largely unconstitutional and punitive, confusing and disorderly, the fact remains that it is a public policy. Thus, notwithstanding the centrality of the land issue in Zimbabwe, land reform policy approaches have largely been a case of 'implement first, formulate and legislate later'.<sup>170</sup> Be that as it may, the SADC Treaty contains an instruction that member states should avoid taking decisions or measures which are detrimental to the principles set out in the Treaty.<sup>171</sup> Thus, the Tribunal found correctly that the applicants have been deprived of their rights to the courts and that their rights to a fair hearing have been breached by Amendment 17.<sup>172</sup> The Tribunal accordingly discussed the right to access to the courts making extensive reference to decisions of other regional and national courts

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<sup>167</sup> Ibid.

<sup>168</sup> *Campbell* op cit (n50) at 35.

<sup>169</sup> Article 4(c) SADC Treaty.

<sup>170</sup> See, G Zhou et al 'Public Policy Making in Zimbabwe: A Three Decade Perspective' (2012) Vol. 2 *INTERNATIONAL JOURNAL OF HUMANITIES AND SOCIAL SCIENCE* 217.

<sup>171</sup> Article 6(1) SADC Treaty.

<sup>172</sup> *Campbell* op cit (n50) at 41.



as well as quasi-judicial bodies who has the capacity to rule on matters pertaining to human rights.<sup>173</sup>

More so, the Tribunal further pointed out that the right of access to the courts is also contained in most international human rights treaties. For instance, the African Charter on Human and Peoples' Rights provides in Article 7 (1) (a) as follows: 'Every individual shall have the right to have his cause heard. This comprises: The right to an appeal to competent national organs against acts violating his fundamental rights...' <sup>174</sup> Hence, the Tribunal was satisfied that indeed the applicants were able to establish that the respondent has breached the applicant's fundamental rights to access the court and to have their cause heard within the national courts. The Respondents were therefore found to have acted in breach of Article 4 (c) and 6(2) of the SADC Treaty

### *(iii) Racial Discrimination*

The applicants also raised the issue of racial discrimination in its submission to the Tribunal in which they argued that the acquisition of land is based on racial discrimination because it targets white Zimbabwean farmers only<sup>175</sup>. The applicants further argued that Amendment 17 was intended to facilitate or implement the land reform policy of the Government of Zimbabwe based on racial discrimination<sup>176</sup>. Furthermore, the Applicants went on to argue that, even if Amendment 17 made no mention of race and colour of the owners of the land to be acquired, that does not necessarily mean that the legislation is not based on considerations of race or colour

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<sup>173</sup> See *Campbell* op cit (n50) at 28- 9, The Tribunal referred to the European Court of Human Rights and quoted two cases; *Golder v United Kingdom* (1975) 1 EHRR 524, in para 34 of its judgement and *Philis v. GREECE* (1991), in para 59, in which it makes a point on the importance of access to the courts.

<sup>174</sup> The Tribunal further referred to the The African Commission on Human and Peoples' Rights case; *Constitutional Rights Project, Civil Liberties Organization and Media Rights Agenda v. Nigeria*, *Comm. No. 140/94, 141/94 145/95*(1999), in which the court reasoned that 'clauses introduced by the Nigerian military government which prevented Nigerian courts from hearing cases initiated by publishers against the search of their premises and the suppression of their newspapers render local remedies non-existent, ineffective or illegal. They create a legal situation in which the judiciary can provide no check on the executive branch of the government'.

<sup>175</sup> *Campbell* op cit (n50) at 41.

<sup>176</sup> *Ibid.*

since only white owned farms were targeted by the Amendment.<sup>177</sup> There is a clear legislative intent directed only at white farmers. According to the applicants, the Amendment strikes at white farmers only and no other rational categorization is apparent therein.<sup>178</sup>

The Tribunal then weighed the allegations made by the applicants against the provisions of the Treaty which provides that; SADC and Member States shall not discriminate against any person on grounds of gender; religion, political views, race, ethnic origin, culture, ill health, disability, or such other ground as may be determined by the Summit.<sup>179</sup> Of relevance in this case is the reference to ‘race’ - the applicants maintain they have been discriminated against because Amendment 17 was designed in such a way that only ‘whites’ will be targeted.<sup>180</sup>

First of all, a review of the provisions of Amendment 17 is of importance at this stage. Section 16A provides that the ‘... following factors shall be regarded as of ultimate and overriding importance...’<sup>181</sup> and that ‘...the people of Zimbabwe must be enabled to reassert their rights and regain ownership of their land...’<sup>182</sup> The Constitution further placed the obligation to pay the compensation to those whose farms have been expropriated on the former colonial power which in this instance is Britain.<sup>183</sup> More so, the Constitution further provided that, where the land is acquired compulsorily and where compensation has to be made, the following factors have to be considered including ‘the history of the ownership, use and occupation of the land’<sup>184</sup> and ‘the price paid for the land when it was last acquired’<sup>185</sup> among others. It is a fact that most of the farm owners in Zimbabwe were ‘white’ commercial farmers who owned large tracts of land and it is conceivable to conclude that the Amendment was technically designed to ‘prey’ on white farmers. The reference to ‘the history of the ownership’ was strategically used in order to stress and identify that the land was

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<sup>177</sup> *Campbell* op cit (n50) at 42.

<sup>178</sup> *Campbell* op cit (n50) at 43.

<sup>179</sup> Article 6(2) SADC Treaty.

<sup>180</sup> *Campbell* op cit (n50) at 42.

<sup>181</sup> Section 16A (1), Amendment 17.

<sup>182</sup> Section 16A (1) (a), Amendment 17.

<sup>183</sup> Section 16A (1) (c) Amendment 17.

<sup>184</sup> Section 16A (2) (a) Amendment 17.

<sup>185</sup> Section 16A (2) (b) Amendment 17.

acquired during the colonial era and as such the constitution sought to ‘correct’ the injustices of colonialism. However, though the argument appears plausible and reasonable, it cannot be applauded because it perpetuates a gross violation of fundamental principles of law and of the very obligations to uphold the rule of law and ‘not to discriminate’ on any of those ground mentioned, ‘race’ included, which Zimbabwe agreed to be bound by when it signed the SADC Treaty.

The Tribunal referred to a number of international instruments which prohibit discrimination.<sup>186</sup> The Tribunal was so specific as to mention that ‘discrimination on the basis of race is also outlawed by the Convention on the Elimination of All Forms of Racial Discrimination (the Convention)’. It is worth noting that the Respondent (Zimbabwe) has acceded to both Covenants, the African Charter and the Convention and, by doing so, is under an obligation to respect, protect and promote the principle of non-discrimination and must therefore prohibit and outlaw any discrimination based on the ground of race in its laws, policies and practices.<sup>187</sup> Furthermore, the Tribunal found that the respondent breached Article 6(2) of the Treaty which enjoins SADC and Member States, including the Respondent, not to discriminate against any person on the stated grounds, one of which is race. It also came to the attention of the Tribunal that the word “discrimination” was not defined in the Treaty and the Tribunal took it upon itself to define the word ‘discrimination’.<sup>188</sup>

A number of international documents were considered and a particular reference was made to General Comment 16 of 2005 of the Committee on Economic, Social and Cultural Rights on the right of men and women to the equality of all economic, social and cultural rights where it concurred with the definition of discrimination which is; ‘Indirect discrimination occurs when a law, policy or programme does not appear to be discriminatory but has a discriminatory effect

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<sup>186</sup> Article 1(3) of the United Nations Charter, Article 2 of the Universal Declaration of Human Rights, Article 2 (1) of the International Covenant on Civil and Political Rights and Article 2 (2) of the International Covenant on Economic, Social and Cultural Rights, Article 2 of the African Charter on Human and Peoples’ Rights (African Charter) and Article 14 of the European Convention on Human Rights.

<sup>187</sup> *Campbell* op cit (n50) at 48.

<sup>188</sup> *Campbell* op cit (n50) at 49-52.

when implemented'.<sup>189</sup> On the forgoing question, the Tribunal concluded that the effects of Amendment 17 have had an unjustifiable and disproportionate impact upon a group of individuals distinguished by race such as the Applicants and it considered that the differentiation of treatment meted out to the Applicants also constitutes discrimination as the criteria for such differentiation are not reasonable and objective but arbitrary and are based primarily on considerations of race.<sup>190</sup> Finally, pertaining to the question of discrimination, the Tribunal found that Zimbabwe has breached its Treaty obligations by discriminating the white land owners on the basis of race. The Tribunal consequently held that the expropriation policy and its nature constituted discrimination in an indirect way because the differential treatment created by that policy was, in one way or another, directed at and felt mostly by white farm holders and it cannot be said it serves a legitimate purpose. However, if the land policy had resulted in fair distribution of farmland to the very landless and poor, and characterised by fair compensation, the purpose of the compulsory land grabs by the government of Zimbabwe would have been legitimate, reasonable and proportionate. Nevertheless, as it stood, the acquisition of land by the government had created an unjustifiable and disproportionate impact upon persons distinguished by race in violation of Article 6(2) of the SADC Treaty.<sup>191</sup> Therefore, following this observation the Tribunal reached the following conclusion;

‘Since the effects of the implementation of Amendment 17 will be felt by the Zimbabwean white farmers only, we consider [that] although Amendment 17 does not explicitly refer to white farmers ... its implementation affects white farmers only and consequently constitutes indirect discrimination or *de facto* or substantive inequality.’<sup>192</sup>

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<sup>189</sup> The Committee on Economic, Social and Cultural Rights: ‘GENERAL COMMENT NO. 16 ON THE EQUAL RIGHT OF MEN AND WOMEN TO THE EQUALITY OF ALL ECONOMIC, SOCIAL AND CULTURAL RIGHTS’ para 13

<sup>190</sup> *Campbell* op cit (n50) at 51.

<sup>191</sup> E de Wet ‘The Rise and Fall of the Tribunal of the Southern African Development Community: Implications for Dispute Settlement in Southern Africa’ (2013) Vol 2 *OXFORD JOURNALS* 7.

<sup>192</sup> Scholtz & Ferreira op cit (n50) at 341.

(iv) *Compensation*

Amendment 17 did not only oust the right to access courts for those whose farms have been expropriated for agricultural and resettlement purposes, but it also denied them the right to compensation. The respondent did not dispute the entitlement of the applicants to compensation; it however, argued that the independence agreement reached in 1978 in London provided that payment of compensation for expropriated land for resettlement purposes would be paid by the former colonial power, Britain.<sup>193</sup> The Tribunal responded to this argument by indicating that in ordinary sense and in international law, it is the expropriating state that should pay compensation and as such the respondent should shoulder the responsibility of paying compensation to the applicants for their expropriated lands. It is the right of the Applicants under international law to be paid, and the correlative duty of the Respondent to pay, fair compensation.<sup>194</sup>

Furthermore, though it has been clearly stipulated in the Constitution that, the government will not be responsible for the compensation of the expropriated land, the Tribunal held that the Respondent cannot rely on national law, to avoid an international law obligation to pay compensation.<sup>195</sup> This obligation of the expropriating state should be maintained regardless of how the farms were acquired in the first place, provided that the Applicants have a clear legal title to them. Finally, the Tribunal held among other things that compensation should be paid fairly to the Applicants by the Respondent to compensate their expropriated farms.<sup>196</sup> In other words, it is settled law that; any expropriating state has an inherent obligation to pay compensation to those who have their property expropriated, irrespective of the cause of such expropriation and it is an intolerable irregularity for an expropriating state to shift this obligation to any other state. This conduct violates due process of law and breaches the right to compensation that is deeply embedded in the principles of law.

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<sup>193</sup> Section 16A (1) Amendment 17.

<sup>194</sup> *Campbell* op cit (n50) at 56.

<sup>195</sup> *Campbell* op cit (n50) at 57.

<sup>196</sup> *Campbell* op cit (n50) at 57.

b) The findings of the Tribunal

To this effect the Tribunal ordered the following;

(1) That the Respondent is in breach of its obligations under Article 4 (c) and that, the Respondent is in breach of its obligations under Article 6 (2) of the Treaty;<sup>197</sup>

(2) That Amendment 17 is in breach of Article 4 (c) and that; Amendment 17 is in breach of Article 6 (2) of the Treaty;<sup>198</sup>

(3) That the Respondent is directed to take all necessary measures, through its agents, to protect the possession, occupation and ownership of the lands of the Applicants, except for Christopher<sup>199</sup> Mellish Jarret, Tengwe Estates (Pvt) Ltd. and France Farm (Pvt) Ltd. that have already been evicted from their lands, and to take all appropriate measures to ensure that no action is taken, pursuant to Amendment 17, directly or indirectly, whether by its agents or by others, to evict from, or interfere with, the peaceful residence on, and of those farms by, the Applicants,<sup>200</sup> and

(4) That the Respondent is directed to pay fair compensation, on or before 30 June 2009, to the three Applicants, namely, Christopher Mellish Jarret, Tengwe Estates (Pvt) Ltd. and France Farm (Pvt) Ltd.<sup>201</sup>

c) The response of Zimbabwe

The Tribunal then granted the application sought by the applicants.<sup>202</sup> However, Zimbabwe branded the Tribunals' ruling as an 'exercise in futility'<sup>203</sup> and the Supreme Court of Zimbabwe responded by quoting the words of Maxwell who reasoned that; 'If there is one rule of construction for statutes and other documents it is that you must not imply anything in them which is inconsistent with the words

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<sup>197</sup> *Campbell* op cit (n50) at 58.

<sup>198</sup> *Ibid.*

<sup>199</sup> *Ibid.*

<sup>200</sup> *Campbell* op cit (n50) at 59.

<sup>201</sup> *Ibid.*

<sup>202</sup> *Ibid.*

<sup>203</sup> See, NewZimbabwe.com, available at <http://www.newzimbabwe.com/pages/Farm77.19109.html>, accessed on 18 November 2013

expressly used, ‘... if the language is clear and explicit, the court must give effect to it for in that case the words of the statute speak the intention of the Legislature.’<sup>204</sup> The renowned scholar went on to argue that;

‘[w]here the language is plain and admits to but one meaning, the task of interpretation can hardly be said to arise. Where by the use of clear and unequivocal language capable of only one meaning, anything is enacted by the legislature; it must be enforced, however harsh or absurd or contrary to common sense the result may be’.<sup>205</sup>

More so, foreign judgment had to meet certain conditions in Zimbabwe for it to be recognized and enforced; one of those conditions is that such judgement should not as a result violate public policy.<sup>206</sup> Though the Supreme Court concurred that as a general rule, public policy would require Zimbabwe to comply with its international treaty obligations and the Tribunals as a result of such obligations, and it stressed that such factors should be balanced against public policy challenges specific to the case at hand. The fact that recognizing or enforcing the Tribunal’s decision made in the Campbell case would be obviously incompatible and contrary to the land reform policy envisaged in the Zimbabwean Constitution, which was also explicitly supported by the Zimbabwean Supreme Court.<sup>207</sup> Therefore, given these circumstances, recognition of the Campbell decision would violate domestic public policy in Zimbabwe.<sup>208</sup>

The court was defiant and not prepared to consider registering or enforcing the Tribunal’s order in the country. It is not surprising that the court refused to comply with the Tribunal’s order for it did not consider the Tribunal to be the court of law as it stated *obiter dictum* that, ‘[t]he taking away of the functions of judicial power and giving them to a Tribunal which is not a court of law is as valid an exercise of legislative power as the taking away of the functions and letting them lie dormant

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<sup>204</sup> P Maxwell et al *On The Interpretation of Statutes* 12 (ed) at 12

<sup>205</sup> *Campbell* op cit (n167) at 18-9.

<sup>206</sup> *Gramara (Private) Limited v The Republic of Zimbabwe*, Case No 5483/09 (Gramara).

<sup>207</sup> *E de Wet* op cit (n191) at 12.

<sup>208</sup> *Gramara* op cit (n206) para 17-8.

without giving them to any other body to discharge.<sup>209</sup> More so, further beatings of white farm owners and their workers continued unrestricted, and expropriation of farms intensified despite the order made by the Tribunal.<sup>210</sup>

When the beatings and torture continued to rage at large in 2008, the Applicants made an urgent application to the Tribunal in which it sought that the Tribunal should hold the government of Zimbabwe to be in breach and contempt of the Tribunal's order. The Tribunal in this application rejected the defence contemplated by Zimbabwe which maintained that there was a state of lawlessness in the country and that the authorities were experiencing difficulties in preventing intimidation and violence. The Tribunal ruled in favour of the applicant.<sup>211</sup>

Furthermore, the government never implemented the order made by the Tribunal after such an application and amidst incessant intimidation and expropriation of land, the applicants once again, for the third time, approached the Tribunal with a similar application to hold the respondent in breach of the Tribunal's order.<sup>212</sup> However, this time around the government refused to participate in the proceedings and again the Tribunal found against the respondent.<sup>213</sup>

Further, the Tribunal, pursuant to Article 32 (5) of the Protocol,<sup>214</sup> referred Zimbabwe's repeated refusal to enforce the Tribunal decision to the Summit for it to impose appropriate action and on each occasion the Summit failed to act.<sup>215</sup> During the 2010 Summit, the SADC Secretariat commissioned an independent review of the Tribunal and the review confirmed and vindicated the decision of the Tribunal.<sup>216</sup> The review confirmed that the Tribunal has legitimate authority to deal with individual human rights petitions;<sup>217</sup> that the decisions of the Tribunal were binding

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<sup>209</sup> *Gramara op cit* (n206) para 18

<sup>210</sup> Laurie Nathan 'The Disbanding of the SADC Tribunal: A Cautionary Tale' (2013) Vol 35 *HUMAN RIGHTS QUARTERLY* 4.

<sup>211</sup> *Campbell op cit* (n122) at 58.

<sup>212</sup> *Campbell op cit* (n50) at 7.

<sup>213</sup> *Ibid.*

<sup>214</sup> This Article provides that, '[i]f the Tribunal establishes the existence of such failure, it shall report its finding to the Summit for the latter to take appropriate action'.

<sup>215</sup> Nathan *op cit* (n210) at 5.

<sup>216</sup> The review was undertaken by Professor Bartels, from the University of Cambridge.

<sup>217</sup> Bartels *op cit* (n62) at 12.



and enforceable within the territories of Member states;<sup>218</sup> and that the Tribunal was lawfully established in terms of the Tribunal Protocol.<sup>219</sup> The Tribunal further pointed out that SADC countries waived the requirement to ratify the Protocol which became part of the Treaty by agreement and binding on all member states<sup>220</sup> and that Zimbabwe's participation in the Tribunal's proceedings and the nomination of the judge to serve in the Tribunal, preclude it from arguing that the Tribunal was not legal. The review finally pointed out that a state may not rely on its constitution or national laws as a defence against a violation of an international obligation.<sup>221</sup> The Summit in 2011, notwithstanding the findings and conclusions of the review, announced that it would maintain the suspension of the Tribunal from hearing any pending or new cases until the Tribunal Protocol had been reviewed and such revision should be approved by the heads of state.<sup>222</sup> The Summit further mandated the region's Ministers of Justice and Attorney-generals to initiate a process of amending the relevant SADC legal instruments.<sup>223</sup> The Summit also resolved that it would not reappoint or replace the Tribunal judges whose term of office had expired.<sup>224</sup> This action and decision of the Summit has completely embroiled the functioning of the Tribunal.

This has been a concern in the international arena and it has attracted a plethora of scholars who have commented rather negatively on the manner in which the Summit dealt with the matter at hand<sup>225</sup> and made a lot of noise in the media.<sup>226</sup>

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<sup>218</sup> Bartels op cit (n62) at 37.

<sup>219</sup> Bartels op cit (n62) at 67.

<sup>220</sup> Bartels op cit (n62) at 75.

<sup>221</sup> Ibid.

<sup>222</sup> SADC, Communique, Extraordinary Summit of Heads of State and Government, 20 May 2011, Windhoek. (Communique).

<sup>223</sup> Ibid.

<sup>224</sup> Ibid.

<sup>225</sup> See, W Scholtz & G Ferreira op cit (n57) and L Murungi and J Gallinetti 'The Role of Sub-Regional Courts in the African Human Rights System' (2010) Vol. 7 *SUR INTERNATIONAL LAW JOURNAL ON HUMAN RIGHTS* 119; D Hemel and A Schalkwyk 'Tyranny on Trial: Regional Court Crack Down on Mugabe's Land "Reform"' (2010) Vol. 35 *YALE JOURNAL OF INTERNATIONAL LAW* 517.

<sup>226</sup> See, Sean Christie 'The SADC Tribunal's Last Gasp', MAIL AND GUARDIAN, 10 June 2011; Mugabe Insists SADC Tribunal "Has been Suspended" Zim Eye, 23 Aug 2010.

Amidst this turmoil, some of the applicants in the Campbell case approached the South African Court to enforce the Tribunal's decision to award legal costs to them.<sup>227</sup> The detail of the arguments and the ruling of the court in this case are provided in the next section.

### III Fick case(s)

In one segment of the tribunal's proceedings, the Tribunal ordered Zimbabwe to pay the legal costs of the respondents which Zimbabwe declined. The respondents therefore applied to the North Gauteng High Court in South Africa to have the costs order recognised in South Africa. Though Zimbabwe declined to participate in the proceedings, an order was made by default recognizing the order of the Tribunal. The High Court then issued a writ of execution authorising the Sheriff for the district of Cape Town to attach immovable properties belonging to Zimbabwe and to sell them in execution of the Tribunal's costs order. The High Court granted the following order by default on 25 February 2010;

‘It is ordered that the rulings by the [SADC] Tribunal delivered on 28 November 2008 and 5 June 2009 are declared to be registered i.e. recognised and enforceable in terms of article 32 of the Protocol of the SADC Tribunal by the High Court of South Africa, and the quantum of the costs pursuant to the latter ruling is to be declared as determined by the Registrar of the SADC Tribunal in the allocator attached, namely US\$ 5 816.47 and ZAR 112 780.13.’<sup>228</sup>

Believing that the properties were to be sold under the authority of the respondent's writ, Zimbabwe applied urgently to the North Gauteng High Court for relief aimed at setting it aside.<sup>229</sup> Zimbabwe then commenced a fresh application for rescission of the order that had been made by Rabie J recognizing the order of the Tribunal.<sup>230</sup> Later it launched yet a further application for rescission of the order that

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<sup>227</sup> *Fick* op cit at (n54) at 3.

<sup>228</sup> *Fick*, op cit (n54) at 8.

<sup>229</sup> Applicants' Heads of Argument page 32, *Fick v. Government of the Republic of Zimbabwe.*, Case No. 77881/2009 (High Ct. S. Afr. Feb. 25, 2010).

<sup>230</sup> *Fick* op cit (n54) at 3.

had been made by Tuchten J.<sup>231</sup> The three applications – the application to set aside the writ, the application to rescind the order of Rabie J, and the application to rescind the order of Tuchten J – were consolidated and came before R D Claassen J, who dismissed them.<sup>232</sup> Hence, Zimbabwe appealed against this judgement in the South African Supreme Court of Appeal<sup>233</sup> which also dismissed the appeal.<sup>234</sup>

Aggrieved by the dismissal of the appeal, Zimbabwe approached the Constitutional Court of South Africa with an application in which it required the Court to determine whether the High Court had the jurisdiction to enforce the costs order made by the Tribunal.<sup>235</sup> For the reasons outlined in the later stage of this discussion, the Constitutional Court also dismissed the application.<sup>236</sup>

When the applicants approached the High Court in South Africa, they were adamant that they would win although the public policy argument against enforcement of the judgment had prevailed before the Zimbabwean High Court.<sup>237</sup> They noted that ‘South African domestic public policy is clearly in favour of registering the rulings,’ since South Africa ‘abhors racial discrimination [and] arbitrary expropriation.’<sup>238</sup> The application was successful and the order was granted against Zimbabwe. Zimbabwe made an application for the rescission of the Gauteng High Court order<sup>239</sup> and in its defence; Zimbabwe argued that, the service order handed down by the High Court (Gauteng) was in violation of Zimbabwe’s sovereign immunity against action in South African courts in terms of the Foreign States Immunities Act<sup>240</sup> (Immunities Act)<sup>241</sup>. More so, Zimbabwe argued that the registration order lacks validity on two grounds. First, that the Tribunal did not have

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<sup>231</sup> Ibid.

<sup>232</sup> Ibid.

<sup>233</sup> *Fick v. Government of the Republic of Zimbabwe*, No 657/11 [2011] SCA.

<sup>234</sup> *Fick* op cit (n54) at 22.

<sup>235</sup> *The Government of Zimbabwe v Louis Karel Fick and Others* [2013] ZACC 22 CCT 101/12 para 4.

<sup>236</sup> Ibid para 106.

<sup>237</sup> F Cowell ‘The Death of the Southern African Development Community Tribunal’s Human Rights Jurisdiction’ (2013) Vol. 13 *HUMAN RIGHTS LAW REVIEW* 160.

<sup>238</sup> *Fick* op cit (n54) at 6.

<sup>239</sup> *Fick* op cit at (n235) para 17.

<sup>240</sup> Ibid para 33.

<sup>241</sup> Foreign States Immunities Act 87 of 1981.

jurisdiction to entertain the farmers' challenge to Zimbabwe's land reform policy.<sup>242</sup> Secondly, the High Court (Gauteng) lacked jurisdiction because the Treaty and the Tribunal Protocol were not approved by the South African Parliament and could not therefore enforce the costs order.<sup>243</sup> The Court dismissed the application stating among other reasons that, 'the applicant, having signed the Treaty and subsequently adopted it, it is not for the applicant to now renege on its obligation to fully import the obligations of the Treaty and the Protocol. Under those circumstances, it seems that the applicant has clearly waived its right to immunity in terms of the Treaty and or the Foreign State Immunity Act'.<sup>244</sup> Discontented with the dismissal of its application in the high court, Zimbabwe approached the Supreme Court of South Africa.<sup>245</sup> The Supreme Court rejected Zimbabwe's arguments and stated that, '...Zimbabwe had waived its immunity by expressly submitting itself to the SADC Treaty and the [Tribunal] Protocol'.<sup>246</sup> It held further that the Amending Agreement was adopted by the prescribed majority, including Zimbabwe.<sup>247</sup> Furthermore, the Supreme Court concluded that the Tribunal Protocol did not need to be ratified by Member States to be binding. It also dismissed the argument that the Tribunal lacked jurisdiction on the additional basis that Zimbabwe's submission to the Tribunal's jurisdiction was sufficient for the purpose of the enforcement of the costs order in South Africa.<sup>248</sup>

Disgruntled by the dismissal of its appeal in the Supreme Court, Zimbabwe approached the South African Constitutional Court.<sup>249</sup> Zimbabwe argued that the South African Parliament did not approve the Treaty in terms of section 231 of the Constitution and that non-compliance is a bar to the enforcement of the costs order in South Africa. For these reasons, Zimbabwe concludes that orders of the Tribunal cannot be registered and enforced by South African courts.<sup>250</sup> The Court rejected this

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<sup>242</sup> *Fick op cit* (n235) para 25.

<sup>243</sup> *Fick op cit* (n54) para 12.

<sup>244</sup> *Fick op cit* (n54) para 25.

<sup>245</sup> *Ibid.*

<sup>246</sup> *Ibid* para 20.

<sup>247</sup> *Ibid.*

<sup>248</sup> *Ibid* para 31.

<sup>249</sup> *Fick op cit* (n235) para 20.

<sup>250</sup> *Ibid* para 29.

argument and stressed that the South African Parliament approved the Treaty in 1995 and thus the Treaty and the Amended Treaty are thus binding on South Africa, at least on the international plane.<sup>251</sup> Furthermore, the Court found that;

‘Zimbabwe’s agreement to be bound by the Tribunal Protocol, including article 32, constitutes an express waiver in terms of section 3(1) of the Immunities Act. It is a waiver by Zimbabwe of its right to rely on its sovereign immunity from the jurisdiction of South African courts to register and enforce decisions of the Tribunal made against it’.

For these reasons and others mentioned in the case, the Constitutional Court dismissed the application. This therefore means the decision of the Tribunal was subsequently enforced in South Africa. It is clear that the decisions of the Tribunal can be enforced by the Member States through the common law procedure as has been demonstrated in the Fick case(s)<sup>252</sup>.

#### IV Legal Analysis

Zimbabwe raised several defences in an attempt to exonerate itself and hence justify its violation of the common objective of SADC principles. Furthermore, Zimbabwe argued that the South African court has no jurisdiction over Zimbabwe because, one; South Africa has not ratified the Tribunal’s protocol and secondly; Zimbabwe is a country which deserves immunity in terms of the Foreign Immunity Act.<sup>253</sup> Thus this section therefore seeks to provide a legal analysis on the issues discussed above and also on the defences raised by Zimbabwe against the decision of both the Tribunal and the South African Courts.

Though it was a novel procedure of its kind, South African courts have demonstrated the possibility that the decisions of the Tribunal can be enforced and as such all member states must take this obligation as mandatory and of significance in as far as protection of human rights and the rule of law is concerned. The decision in

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<sup>251</sup> Ibid para 30.

<sup>252</sup> Ibid note 54.

<sup>253</sup> *Fick op cit* (n235) para 32.

the *Fick*<sup>254</sup> case marked a victory of the rule of law in the region and the muscle of the Tribunal in championing human rights emerged in an unprecedented way. The discussion above indicates two major obstacles to the enforcement of the Tribunal decisions within the national courts of member states and these are; lack of political will from the leaders of member states and an overrated sovereignty of states. This discussion will extensively engage with these two problematic issues in the subsequent sections.

#### *a) Political will*

Though political will is rather a controversial subject, for the purposes of this discussion, it is important to begin by giving ‘political will’ a specific and narrow meaning. Political will, can be defined as ‘the determination of an individual political actor to do and say things that will produce a desired outcome’.<sup>255</sup> The desired outcome in this instance probably refers to the objectives and principles envisaged in SADC Treaty. Promotion of human rights, democracy and the rule of law are fundamental principles of SADC Community which Zimbabwe has deliberately breached in the Campbell case.<sup>256</sup> The collection of the events leading to the spurning of the Tribunal’s ruling by Zimbabwe indicates to any sound mind that, Zimbabwe as a Member State has lacked political will to act in line with the international objective of SADC Treaty.

More so, though the Protocol provides seemingly viable enforcement mechanisms,<sup>257</sup> the spurning of the Tribunal decision by the Zimbabwean government has revealed shaky relationships between the Tribunal and the domestic courts of the member states. This is a problem to be concerned about in as far as the fundamental principles of community based on law are concerned. The failure by the respondent to comply with the Tribunal’s ruling represents not only the complexities on of the enforcement capacity of the Tribunal, but also an

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<sup>254</sup> *Fick* op cit (n54) at 8.

<sup>255</sup> D Brinkerhoff ‘Unpacking the Concept of Political Will to Confront Corruption’ ANTI-CORRUPTION RESOURCE CENTRE, available at <http://www.rti.org>, accessed on 29 December 2013.

<sup>256</sup> Article 4(c) SADC Treaty.

<sup>257</sup> Article 32(1) SADC Protocol.

impediment of the credibility of SADC law as whole and a threat to the continental agenda of integration. In essence, it is an unambiguous demonstration of political will that SADC Member states, Zimbabwe included, have signed and ratified the SADC Treaty. However, the authenticity of this will become questionable immediately when a Member State blatantly refuses to execute such political will when the need arises. Therefore, it can plausibly be concluded that, lack of political will has indeed contributed to the *status quo* of the Tribunal because of Zimbabwe's lack of political will to comply with the decision of the Tribunal and its notorious refusal to maintain the principles of SADC which are non-discrimination, respect of human rights, democracy and the rule of law.<sup>258</sup>

#### b) Sovereignty

The problem is actually that within SADC region, member states cling to absolute sovereignty and erroneously use it as a shield against international legal obligations. Although sovereignty is often blurred, and too complex, it cannot be denied that it played, and continues to play a significant role in modern constitutional and international legal theory as well as in politics. It is not entirely the purpose of this section to discuss sovereignty as a whole; however it is important to make a brief reference to the concept of sovereignty in order to make a relevant analysis of the claim of sovereignty and immunity made by Zimbabwe when it appealed the decision of the North Gauteng High Court.<sup>259</sup>

The 'sovereign state' is still the primary actor of the international community.<sup>260</sup> Zimbabwe, just as the other fourteen SADC member states, is a sovereign state which possesses full legal personality. Sovereignty as a legal notion, integrates a political dimension which paradoxically often defies legal control. In other words, sovereignty as a legal concept is characterized by an uneasy tension between an effort to define and therefore limit the powers of the state who claims to be sovereign, and that sovereign's efforts to evade the control exerted by legal rules

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<sup>258</sup> Article 4 SADC Treaty.

<sup>259</sup> *Government of the Republic of Zimbabwe v Louis Fick Kerel* [2011] No 657 (SCA) para 20.

<sup>260</sup> B Fassbender, (ed) N Walker '*Sovereignty and Constitutionalism in International Law: Sovereignty in Transition*' (2003) at 9.

and procedures, or to change the law according to state interest.<sup>261</sup> However, this concept has continually evolved and developed to suit the modern political and economic paradigm. Sovereignty, which prevails in the 21<sup>st</sup> century, is more flexible and it states that member states are bound by those rules of law to which they have agreed, either by the conclusion of the Treaties or via custom.<sup>262</sup> Wolfgang Friedmann identified sovereignty in the modern context as a classical system of international law - a 'law of co-existence.' Further he commented that 'this move of international society, from essentially a negative code of rules of abstention to positive rules of cooperation...is an evolution of immense significance for the principles and structure of international law'.<sup>263</sup>

Today, given the degree of interdependence of the relations between states, one cannot consider their sovereignty of states as absolute. More so, the SADC Theme document in 1992 raised a concern that integration left to market forces alone would not occur.<sup>264</sup> Extension of the goal of integration was urgently required and states should give away some degree of sovereignty in order to create a vigorous mechanism which is necessary and relevant for regional decision making, coordination, execution and enforcement.<sup>265</sup> Unfortunately, this model scheme was not supported at the beginning when the SADC deliberately refused to set up a collective system which will monitor state compliance with the Treaty's provisions or domestic governance.<sup>266</sup> The new organisation on politics, defence, and security co-operation, which was earmarked to oversee state performance, received rather insufficient recommendations as it was believed to be too intrusive.<sup>267</sup> This proposal was dismissed by the ministerial committee and dubbed it as intolerable interference in domestic affairs.

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<sup>261</sup> Ibid.

<sup>262</sup> Ibid.

<sup>263</sup> See W Friedmann 'The Changing Structure of International Law' (1964) Vol. 38 *CHICAGO JOURNALS* 62.

<sup>264</sup> SADC Theme document 1992 page 32-35 <http://www.sadc.int/documents-publications/show/865> accessed on the 3rd of August 2013.

<sup>265</sup> Ibid.

<sup>266</sup> SADC Secretariat, terms of references for the SADC Sector on Political Co-operation, Democracy, Peace and Security (Gaborone 1996).

<sup>267</sup> Ibid.



However, the refusal by member states to comply with international legal commitments as shown above is not unique, states who sign/ratify regional and international human rights treaties frequently fails to honour their obligation at the end. The question therefore is why is it so? Well, the reasons may vary greatly, but as for SADC, the political diversity, coupled with the State's sheer commitment to traditional concept of sovereignty,<sup>268</sup> also excludes the potential of having a feasible and effective Tribunal whose jurisdiction covers such aspects of human rights and the rule of law at large.

It has been argued and rightly so, that in international law sovereignty is a term that is as ubiquitous as it is elusive. It denotes freedom of action and while it is true, anyone would hardly argue that this freedom is unrestrained by international obligations.<sup>269</sup> In many occasions sovereignty is simply misused as a smoke screen or as an excuse for violations of the law. It is maintained that sovereignty is not an absolute concept but simply a descriptive term that represents the most important participant and capacity of a particular state in international relations of the states. The fact that the states sometimes use the argument of sovereignty to resist international co-operation and to frustrate international obligation per se, detract from this fact<sup>270</sup>.

More so, co-operation is vital especially in relation to international law and without co-operation it is inconceivable to achieve any agreement. Co-operation means there is an agreement to wade-off some sovereign powers in order to give the regional body some supreme power. In other words, co-operation is the most important practical demonstration of sovereignty.<sup>271</sup> Therefore to provide an answer to the question raised, it suffices to mention that sovereignty is not enough of a defence to rise against obligations under international law. A renowned scholar<sup>272</sup> laments that '[a]n absolute and irresponsible sovereignty, the final judge of its

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<sup>268</sup> Article 4(a) SADC Treaty.

<sup>269</sup> C Schreuer, J Delbrück (ed) '*State Sovereignty and the Duty of States to Cooperate – Two Incompatible Notions*' in INTERNATIONAL LAW OF COOPERATION AND STATE SOVEREIGNTY (2002) 163-170.

<sup>270</sup> Ibid.

<sup>271</sup> Ibid.

<sup>272</sup> C Eagleton '*THE RESPONSIBILITY OF STATES IN INTERNATIONAL LAW*' (1928) chap 1 9-14.

own act, is in international relations merely a figment of the imagination, logically impossible in the facts of practise, though its dead branches yet ramify throughout the entire field of international law, badly hampering its growth.<sup>273</sup> This entails that sovereignty, though important, should not be used as a shield against community laws.

### c) Regional Integration Commitment Dishonoured

it is important to note that the objectives of SADC as a regional organisation is to attain economic growth and development which will in turn help in alleviating poverty and enhancing the quality of life of the Southern African people and to support those who are socially disadvantaged through regional integration.<sup>274</sup> Therefore, SADC as a regional bloc carries a significant role to play in the gradual achievement of the continental objective of integration,<sup>275</sup> which includes the speeding up of the political and socio economic integration of Africa on the basis of among other things, the observance of democratic principles, human rights, the rule of law as well as good governance.<sup>276</sup>

It is clear therefore that the Tribunal has an important role to play within the region and it has a mandate to pursue regional integration through sound maintenance of the rule of law and legal order.<sup>277</sup> However, it is unfortunate that the Tribunal, which should see to it that the commitment of regional integration is being pursued in a legal and acceptable manner, has been suspended, and this, does not bode well for integration. This therefore entails that, the whole agenda of integration has also been affected rather negatively. It was opined that;

‘There are many positive aspects to the role and need for regional courts. In systems of integration there is a genuine need for an independent court with its own jurisdiction. Regional courts with wide jurisdiction strengthen the federal or common system. The court will have an interest in safeguarding the interests

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<sup>273</sup> Ibid.

<sup>274</sup> SADC preamble.

<sup>275</sup> Article 3(i) of the Constitutive Act of the African Union (CAAU).

<sup>276</sup> Article 3(j) CAAU.

<sup>277</sup> Scholtz & Ferreira op cit (n57) at 351.

and integrity of the common system. Furthermore, a court underlines that the common system is a system based on law and order and respect for the rule of law'.<sup>278</sup>

More so, Mogoeng CJ stated that; 'The purpose for the establishment of SADC was to achieve certain regional developmental goals. Some of the key objectives are set out in the Preamble to the Treaty as: a collective realisation of the progress and well-being of the peoples of Southern Africa; promotion of the integration of the national economies of Member States; the need to mobilise international resources and secure international understanding, support and cooperation; and, more importantly, 'the need to involve the peoples of the region centrally in the process of development and integration, particularly through the guarantee of democratic rights, observance of human rights and the rule of law'.<sup>279</sup>

In essence, the Tribunal acts as the wheel which drives the SADC Region towards its final goal of economic integration, and its suspension does not only pose a threat to this agenda, but it also affects the economic process of the region in a negative way in that it will scare out investors and private firms for the fear of no redress of their trade disputes because the Tribunal is inactive. More so, the long term consequences for investment, development and respect for the rule of law will be negative, while the benefits of freer trade and the certainty of a rules-based system will be undermined.<sup>280</sup> Trade in SADC apparently takes place on the basis of discretions and ad hoc policy responses.<sup>281</sup> A formal dispute settlement forum like the Tribunal promotes transparency and certainty. The private sector, firms, service providers, investors and consumers then know where they stand in case they consider doing business in the region.<sup>282</sup> However, the status quo of the SADC

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<sup>278</sup> K Metcalf and L Papageorgiou *Regional Integration and Courts of Justice: Comparative Study on Courts of Regional Integration* (2005) 109.

<sup>279</sup> *Fick op cit* (n235) para 6.

<sup>280</sup> *Ibid.*

<sup>281</sup> G Erasmus 'Does it matter whether SADC has a Tribunal?' *TRADE LAW CENTRE*, available at <http://www.tralac.org/2013/06/12/does-it-matter-whether-sadc-has-a-tribunal/> accessed on 30 January 2014

<sup>282</sup> *Ibid.*

Tribunal does not allow this certainty and this violates the very agenda of integration perpetuated by the Treaty.<sup>283</sup>

## V Conclusion

The spurning of the Tribunal decision by the government of Zimbabwe has demonstrated the unwillingness of some member states to comply with some international legal obligations. As shown in the discussion above, SADC Countries have been implacably opposed to any transfer of sovereignty to the regional level. However, the Tribunal's ruling posed a direct challenge to sovereignty, rejecting the validity of a constitutional provision approved by the Zimbabwean parliament and courts and refuting the lawfulness and legitimacy of the government's approach to redress the land iniquities inherited from colonialism and white settler rule.<sup>284</sup> Despite the firm stance taken by the Tribunal against Zimbabwe, the Summit nevertheless went on to dissolve the Tribunal. The surprising aspect is that the Summit, from the beginning, agreed to set up the regional court and endowed it with the mandate to rule on disputes between citizens and states in relation to the application of the Treaty and other protocols thereto. Therefore, the *de facto* suspension of the Tribunal by the Summit will be discussed in the subsequent chapter.

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<sup>283</sup> Preamble, SADC Treaty.

<sup>284</sup> Nathan op cit at (n210) at 5.

## CHAPTER FOUR: SUSPENSION OF THE TRIBUNAL AND THE STUDY REVIEW

### I INTRODUCTION

The Tribunal's decision in the Campbell case was an unequivocal victory for the rule of law, democracy and human rights in the Southern African region. The Tribunal, in finding against the Zimbabwean government, had demonstrated the will to serve the region's human rights agenda and indicated that it is a reliable and independent institution which is able to ensure the maintenance and implementation of the SADC legal order beyond individual or political interference. The stance taken by the Tribunal was not only 'shocking' to the region's political leaders, but it was, to them, also an act of 'undermining' their political interest and solidarity. The reaction of the SADC Summit of the heads of state and government in 2010 has exposed the anger that the political leaders had against the tribunal. After the annual summit meeting in 2010, Patrick Chinamasa (the then Minister of justice in Zimbabwe), announced that the Heads of State and government have suspended the Tribunal for six months pending the outcome of a review by the region's justice Ministers and Attorneys-generals.<sup>285</sup> The Summit resolved that the SADC Secretariat would review the terms of reference of the Tribunal; however, the outcomes were not taken into consideration. Therefore, it is the purpose of this chapter to discuss the suspension of the Tribunal and the consequences thereof. Furthermore, the farmers approached the AU and it is therefore important to reflect the role of the African Commission and the African Court of Human and Peoples' Rights and its potential contribution in protecting the rule of law. Lastly, this chapter will also discuss the study review on the Tribunal conducted by Lorend Bartels in order to identify and analyse the plight of the rule of law and human rights in the SADC Region.

### II Suspension of the Tribunal

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<sup>285</sup> Ceasar Zvayi, 'Southern African Development Community Tribunal Suspended,' The Herald (Zimbabwe), 17 Aug 2010 available at <http://panafricannews.blogspot.com/2010/08/south-african-development-community.html>, accessed on 28 October 2013.

Zimbabwe viewed the Tribunal's decisions as an intolerable interference in the country's domestic affairs. In 2009 the then Zimbabwe's Minister of Justice, Patrick Chinamasa, announced that his government had withdrawn from the Tribunal's jurisdiction.<sup>286</sup> He argued that the regional court was not legally constituted because its Protocol had not been ratified by two-thirds of the member states, a requirement that he said was stipulated in the Protocol.<sup>287</sup> Though the Tribunal reported the matter to the summit for it to take appropriate action, the Summit failed to act.<sup>288</sup> For Zimbabwe the Summit's passivity was not sufficient, the government also wanted to ensure that the Tribunal's rulings were rendered void. To this end, Chinamasa successfully lobbied his ministerial counterparts in other SADC countries to support Harare's stance. In 2010, after the annual summit meeting, he announced that the Heads of State had suspended the Tribunal for six months pending the outcome of a review by the region's Justice Ministers and Attorneys generals.<sup>289</sup>

There are political and historical reasons for other member states to stand with Zimbabwe which date back to the colonial era. When the Tribunal referred Zimbabwe's refusal to comply with its ruling, the Summit faced a stark choice: it could either defend the Treaty and the region, or it could support a member state whose president and ruling party had liberated their country from colonialism and thereafter assisted other liberation movements in Southern Africa.<sup>290</sup> The decision to back Zimbabwe reflected SADC's hierarchy of values, in terms of which sovereignty and regime solidarity take precedence over human rights and democracy. A complementary interpretation is that state interests prevail over the regional legal edifice.<sup>291</sup> In 2011 the Namibian Minister of Justice, Pendukeni Iivula-Ithana, made this point explicitly, explaining that the Tribunal was under review so that it better served the interests of member states: 'What is cast in stone is our commitment to work together as a regional body, SADC. How we do so is not cast in stone and

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<sup>286</sup> Ibid.

<sup>287</sup> Mabasa Sasa *Zim Pulls out of SADC Tribunal*, HERALD (Zimbabwe), 2 Sept. 2009, available at [http://www.zimbabwesituation.com/sep3\\_2009.html](http://www.zimbabwesituation.com/sep3_2009.html), accessed on 25 November 2013

<sup>288</sup> Nathan op cit (n210) at 5.

<sup>289</sup> Ibid.

<sup>290</sup> Ibid.

<sup>291</sup> Ibid.

should suit our collective interest. The instruments serve us, they are for us, and this is not a reversible position.<sup>292</sup>

In 2011, the Summit disregarded the findings and recommendations of the independent review and officially announced that it would maintain the moratorium on the regional court hearing any pending or new cases until the Tribunal Protocol had been reviewed and that it will not reappoint the Tribunal judges whose terms of office have expired<sup>293</sup>. This *de facto* suspension has completely paralysed the Tribunal's functionality. The Tribunal judges wrote an angry letter to the Executive Secretary of SADC, arguing that the Summit's decision amounted to dissolving and not merely suspending the court.<sup>294</sup> This decision was illegal, *ultra vires*, and taken in bad faith. While the Summit was at liberty to amend the Treaty and the Tribunal Protocol according to the prescribed procedures, prior to making such amendments it could not legitimately limit the Tribunal's jurisdiction, to which the Summit itself was subject, and it could not legitimately stop the Tribunal from hearing the cases before it. The judges concluded that the Summit's action was a breach of the Treaty and the right of access to justice.<sup>295</sup>

Norman Tjombe, a Namibian human rights lawyer, maintains that the Summit was never enthusiastic about the Tribunal, taking fifteen years from the signing of the 1992 treaty until the appointment of the Tribunal judges in 2007; throughout this period, "it was actually just international powers pushing for 'the regional court'".<sup>296</sup> Judge Ariranga Pillay, the former chief justice of Mauritius, who headed the Tribunal at the time of its dissolution, shares Tjombe's opinion. Pillay believes that

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<sup>292</sup> John Ekongo 'SADC Tribunal Should Serve Our Interests', New Era, 27 July 2011.

<sup>293</sup> SADC Communique, Extraordinary Summit of Heads of State Government, 20 May, Windhoek.

<sup>294</sup> Ariranga Pillay, Rigoberto Kambavo, Onkemetse Tshosa & Frederick Chomba, Three Illegal and Arbitrary Decisions Taken in Bad Faith by the SADC Council of Ministers and Summit of Heads of State and Government, Letter to the Executive Secretary of SADC (13 June 2011), available at <http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71656?oid=242579&sn=Detail&pid=71616>, accessed on 18 November 2013.

<sup>295</sup> Nathan op cit at (n210).

<sup>296</sup> Sean Christie *The SADC Tribunal's Last Gasp*, Mail & Guardian, 10 June 2011, available at <http://mg.co.za/article/2011-06-10-the-sadc-tribunals-last-gasp>, accessed on 6 December 2013

for SADC's leaders, the Tribunal was a gambit 'to get funds from the European Union and others'.<sup>297</sup> Pillay was quoted as follows;

*[The Tribunal] gave off all the right buzz words, you know, 'democracy, rule of law, human rights' and then they [the leaders] got the shock of their lives when we said these principles are not only aspirational but also justiciable and enforceable.*<sup>298</sup>

Pillay is of the view that the Summit did not foresee that the Tribunal would actually function as a supranational authority and declare invalid the laws and policies of a Member State.<sup>299</sup> In a startling collusion to dismantle the Tribunal, the President of the Republic of Tanzania, Jakaya M. Kikwete, was also quoted bemoaning the Tribunal stating that; 'we are the creators of this monster and we said we thought we had created an animal which was proper, but no, we had created a monster'.<sup>300</sup> In essence, the leaders of Southern Africa were prepared to sign the Treaty and protocols because they did not anticipate any real consequences emanating from this. They paid no heed to the legal instruments and the Summit refrained from criticizing and taking action against them when they breached those instruments.<sup>301</sup> Indeed, as will be shown below, the SADC heads of state closed ranks in solidarity with Zimbabwe.<sup>302</sup>

### III The Study Commissioned by the SADC Secretariat

During the SADC Heads of Government meeting in Windhoek in August 2010, President Mugabe, being aware of the violation of human rights in the *Campbell*

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<sup>297</sup> Sean Christie, *Killed off by "Kings and Potentates,"* Mail & Guardian, 19 Aug. 2011, available at <http://mg.co.za/article/2011-08-19-killed-off-by-kings-and-potentates>, accessed on 8 January 2014.

<sup>298</sup> Ibid.

<sup>299</sup> Nathan op cit at (n210) at 9.

<sup>300</sup> *SADC Law Binding: Independent Review Ratifies Land Grab Decision*, Zimbabwean, 13 April 2011, available at [http://www.thezimbabwean.co.uk/index.php?option=com\\_content&view=article&id=38881:sadc-law-binding&catid=69:sunday-top-stories&Itemid=30](http://www.thezimbabwean.co.uk/index.php?option=com_content&view=article&id=38881:sadc-law-binding&catid=69:sunday-top-stories&Itemid=30), accessed on 8 January 2014.

<sup>301</sup> Ibid.

<sup>302</sup> Nathan op cit (n210) at 9.



case, vied to block any discussion of Zimbabwe and its human rights record. Members of the SADC Secretariat issued press statements insisting that Zimbabwe would be on the agenda, but during the course of discussions the issue was avoided.<sup>303</sup> The Summit communique stated that it was decided by the Summit ‘that a review of the role, functions and terms of reference of the SADC Tribunal should be undertaken and concluded within six months’.<sup>304</sup> Joao Samuel Caholo, Deputy Executive Secretary of the SADC, told journalists that the Tribunal would not be able to conclude any ongoing cases or take on any new ones before the end of the review process that was to be carried out by SADC Justice Ministers.<sup>305</sup>

Therefore, pursuant to this review plan, the SADC Secretariat then appointed Lorand Bartels to conduct an independent review of the Tribunal and its legal powers, which was concluded on April 2011.<sup>306</sup> The report broadly confirmed the jurisdiction of the Tribunal and its legal authority and concluded that SADC Member States were, by suspending the Tribunal, in violation of their international legal obligations.<sup>307</sup> A similar view was expressed by Professor Gerhard Erasmus, who argued that the suspension was ‘unlawful in terms of SADC legal instruments and international treaty law’ and that simply altering the Tribunal Protocol would not alter the 2001 Amended SADC Treaty that clearly delegated powers to the Tribunal.<sup>308</sup> Surprisingly, the response to the Bartels Report from an extraordinary SADC summit at Windhoek in May 2011 was to continue with the suspension of the SADC Tribunal. However, when questioned during press conference whether details of these reports would be publicised<sup>309</sup>, the Executive Secretary of SADC, Tomaz

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<sup>303</sup> Bell ‘*SADC Tribunal suspended over Government refusal to honor rulings*’, South West Africa Radio, 18 August 2010, available at: <http://www.swradioafrica.com/news180810/connhigh180810.htm>, accessed on 20 Nov 2013.

<sup>304</sup> Communique of the 30th Jubilee Summit of SADC Heads of State and Government, at para 32, available at: <http://www.info.gov.za/speech/DynamicAction?pageid/4461&sid/412314&tid/415559>, accessed on 20 Nov 2013.

<sup>305</sup> E de Wet op cit (n191) at 3.

<sup>306</sup> Bartels op cit (n62) at 18.

<sup>307</sup> Ibid at 9.

<sup>308</sup> Steinmann ‘Summit assigns itself Jurisdictional Powers it does not have’, Namibia Economist, 17 August 2012, available at: <http://www.economist.com.na/editors-desk/1724-summitassigns-itself-jurisdictional-powers-it-does-not-have>, accessed on 20 November 2013.

<sup>309</sup> F Cowell op cit (n237) at 162.

Salomao, was adamant that ‘neither the media nor SADC citizens needed to know’ their contents.<sup>310</sup>

It is therefore the purpose of this section to discuss and analyse the findings as made by Bartels. In the report, Bartels dealt with various aspects of the Tribunal including *inter alia*; SADC law and national laws, the human rights mandate of the Tribunal, jurisdiction of the Tribunal, enforcement of the Tribunal’s decision, impartiality and independence of the Tribunal, access to justice and the consent of member states to the jurisdiction of the Tribunal. These aspects will be dealt with separately.

#### a) SADC Law and national laws

First of all, the report revealed that SADC members in concluding the SADC Treaty established a ‘community’ under international law. Therefore as an international organization it is governed by international law and, within its powers, generates norms with the status of international law. The nature of an international organization is norm based, and the most significant result of this is that a state which is a member of that organization may not rely on its national laws (including norms of constitutional status) as a defence to a violation of an international obligation.<sup>311</sup> It follows therefore that, if it is the mere existence of a SADC member state’s national law that violates a SADC norm, that Member State must bring that law into line with the SADC norm.<sup>312</sup>

Following this argument, the report stressed that Zimbabwe was then under an obligation to revoke the SADC-inconsistent elements of its legislation. In essence, what Bartels suggested is that, Section 16A and 16B of Amendment 17<sup>313</sup> is inconsistent with the SADC Treaty and as such it is desirable to bring it into conformity with the Treaty and other international instruments. Amendment 17 exempts the government of Zimbabwe from its obligation to pay compensation for agricultural land compulsorily acquired for resettlement<sup>314</sup> and those who are

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<sup>310</sup> Ibid.

<sup>311</sup> Article 27 of the Vienna Convention of the Law of Treaties.

<sup>312</sup> Bartels op cit (n62) at 7.

<sup>313</sup> Bartels op cit (n62) at 9.

<sup>314</sup> Section 16A 1(c) (ii) Amendment 17.

affected by that provision shall not apply to a court to challenge the acquisition of the land by the State, and no court shall entertain any such challenge.<sup>315</sup> These provisions are in violation of Article 4 (c) of the Treaty which obliges member states to respect human rights, democracy and the rule of law.

#### b) Human Rights

Though the preamble of the SADC Treaty is mindful of the need to involve the people of the region, centrally, in the process of development and integration, particularly through the guarantee of democratic rights, observance of human rights and the rule of law, SADC has failed to live up to its promises as can be witnessed by the disbandment of the Tribunal. Article 4(c) of the SADC Treaty states that ‘SADC and its Member States shall act in accordance with the principles of human rights, democracy and the rule of law among others. Bartels concluded that Article 4 (c) *prima facie* constitutes a binding obligation. The report has rejected the other objections raised against this view, stating that the objection that ‘the norms referred to as ‘principles’ are of non-binding effect,’ ignores the longstanding usage in international law of the term ‘principles’ to refer to binding obligations.<sup>316</sup> The report concluded that ‘it goes without saying that a simple reference to the principles of ‘human rights’ is sufficiently clear to be interpreted and applied by any tribunal, especially when read in the light of more detailed applicable human rights norms.

Therefore, the provision of the Treaty in respect of the principles of human rights, democracy and the rule of law, are binding in nature and they cannot be derogated from or interpreted with less weight from the binding obligations. The arguments raised contrary to this view do not hold water, especially in relation to international organizations whose principle mandate is to promote and protect fundamental human rights, democracy and the rule of law. As such, there is no reason to doubt the correctness of the rulings in *Campbell* that Article 4(c) of the SADC Treaty constitutes an obligation binding on the SADC Member States.<sup>317</sup>

#### c) Enforcement of the Tribunal’s Decisions

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<sup>315</sup> Section 16B 3(a) Amendment 17.

<sup>316</sup> Bartels op cit (n62) at 9.

<sup>317</sup> Article 4(c) SADC Treaty.

It is not in contention that the SADC Tribunal issues ‘decisions’ on matters within its jurisdiction which are final and binding,<sup>318</sup> and it therefore entails that the SADC Tribunal has the power to make decisions as to whether a given party has violated a relevant obligation set in the Treaty or any other instrument thereto. However, what is not clear therefore is whether the Tribunal is also empowered to order specific performance of a treaty obligation owed to an individual (as opposed to one owed to a state), in the absence of an express power to this effect.<sup>319</sup> Be that as it may, Bartels stated in the report that; it is axiomatic that states are obliged to comply with binding decisions of international tribunals, including any decision on remedies. This rule would apply by default, but it is reiterated expressly in the SADC Treaty and Tribunal Protocol. Decisions of the SADC Tribunal are stated to be binding and must be complied with.

Following this fact, it is clear that the refusal by Zimbabwe to enforce the decision of the Tribunal was a gross violation, not only of its Treaty obligations to promote human rights, but also a blatant repudiation of international standards of the rule of law and democracy. The report reiterated that, ‘what is important is that Zimbabwe is obliged itself to comply with binding Tribunal decisions, a point that is best expressed in Article 32(2)<sup>320</sup>. The report went on to confirm that the result of the case<sup>321</sup> is correct insofar as it demonstrates that the obligation to comply with a SADC Tribunal decision is independent of any obligation to enforce those decisions domestically’.<sup>322</sup>

#### d) Impartiality and independence of the Tribunal

Bartels also identified something common with almost all international Tribunals and that is all the instruments establishing the SADC Tribunal make no mention of its independence. However, he noted a number of provisions that are designed to ensure that both the Tribunal and its Members are independent of public and private

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<sup>318</sup> Article 16(5) SADC Treaty.

<sup>319</sup> Bartels op cit (n62) at 37.

<sup>320</sup> SADC Protocol.

<sup>321</sup> *Campbell* op cit (n50).

<sup>322</sup> Bartels, op cit (n62) at 41.

sector interests, and that its Members discharge their duties impartially. There are a number of issues that have been raised in the report that may impair the independence of the Tribunal; I will briefly discuss these below;

#### e) Budget of the Tribunal

The budget of the Tribunal is funded by the SADC Community<sup>323</sup> and Bartels notes that “it is normal for the budgets of international tribunals to be funded from the general budget of the organizations to which they are attached, and also that this is subject to the overall control of the political organs of the organization”.<sup>324</sup> However, the suggestion was made in the report which proposed the amendment of Article 33 to provide for an independent funding mechanism. The automatic funding mechanism maybe be devised or forged in the Treaty in which it should stipulate that the budget for the Tribunal should be integrated into the SADC organization’s budget as a whole and it will then be directed automatically to the Tribunal. This proposal is desirable for two reasons; firstly, a lack of automatic funding can impair the functioning of a Tribunal and secondly, dependence on a political organ can have a negative impact on the independence of a tribunal and its judges.<sup>325</sup>

#### f) Tenure and reappointment

The report identified that the present rules governing tenure and reappointment of SADC Tribunal Members which are contained in Article 6 (1),<sup>326</sup> are manifestly insufficient. The protocol provides that;

‘[t]he Members shall be appointed for a term of five (5) years and may only be re-appointed for a further term of five (5) years. However, of the Members initially appointed, the terms of two (2) of the regular and two (2) of the additional Members shall expire at the end of three (3) years. The Members whose term is to expire at the end of three (3) years shall be chosen by a lot to

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<sup>323</sup> Article 33 SADC Protocol.

<sup>324</sup> Bartels, op cit (n62) at 63.

<sup>325</sup> Ibid.

<sup>326</sup> SADC Protocol.

be drawn by the Executive Secretary immediately after the first appointment.’

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The report identified two problems with this provision, firstly it is not specified how the decision to reappoint a Tribunal Member is to be made; secondly, nothing is said about the mechanism for requesting a reappointment.<sup>328</sup> Consequently, these ambiguities, he opined, affect the independence of judges and this is unacceptable for a judicial arm of the community. He therefore recommended that there is a need to amend Article 6(1) to provide for automatic reappointment of SADC Tribunal Members unless the Summit decides otherwise.

Therefore, in a nutshell, the report made the following findings:<sup>329</sup>

- The SADC Tribunal has the legal authority to deal with individual human rights petitions. SADC Community law should be supreme to domestic laws and constitutions.
- Decisions of the SADC Tribunal should be binding and enforceable within the territories of all SADC member states.
- The SADC Tribunal was legally established in terms of the SADC Tribunal Protocol.
- The SADC states waived the requirement to ratify the SADC Tribunal Protocol which became a part of the SADC Treaty by agreement and is binding on all SADC member states.
- Zimbabwe may not state that the Tribunal was not legally constituted when they participated in all the proceedings of the SADC Tribunal and nominated a judge for appointment.
- A Member State may not rely on its national laws (including norms of constitutional status) as a defence against a violation of an international obligation.

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<sup>327</sup> Article 6(1) SADC Protocol.

<sup>328</sup> Bartels op cit (n62) at 65.

<sup>329</sup> Article 3, 4 & 6 SADC Protocol.

#### IV The Role of the African Commission and the African Court of Human and Peoples' Rights in Pursuit of the Rule of Law

There are limited alternative mechanisms for dispute settlement on a regional level that are available at present in as far as human rights disputes are concerned. The most reliable and available mechanisms are the African Commission and the African Court on Human and Peoples' Rights (ACHPR).<sup>330</sup> All SADC members have ratified the African Charter, which provides for a monitoring body in the form of the African Commission.<sup>331</sup> Its purpose is to receive complaints from members concerning the violation of the African Charter mainly from States against another State, or by individuals and non-governmental organizations (NGOs) against one or more State.<sup>332</sup> In case of serious human rights violations, the commission will only make a factual report, accompanied by its findings and recommendations; however, the recommendations of the African Commission are non-binding due to the fact that it is a quasi-judicial body.<sup>333</sup>

The suspension of the Tribunal has ignited a considerable criticism across the region and in the international legal community at large. The disgruntled farmers took the matter upon them and approached the African Commission in which they sought an order that would ensure the SADC Tribunal would be reconstituted and continue to function in all respects as established by Article 16 of the SADC Treaty. At the 52nd Ordinary Session of the African Commission on Human and People's Rights held at Yamoussoukro, Cote d'Ivoire, the African Commission ruled that the complaint lodged with it on behalf of Zimbabwean farmers Luke Tembani and Ben Freeth against 14 heads of state of SADC countries was admissible.<sup>334</sup> The decision of the Commission is a significant breakthrough in a legitimate campaign to restore the rule of law in Zimbabwe and to restore the SADC Tribunal which will have the capacity to vindicate and protect human rights.

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<sup>330</sup> Erika de Wet, op cit (n191) at 7.

<sup>331</sup> Article 30 ACHPR.

<sup>332</sup> Article(s) 48, 49 & 55 ACHPR.

<sup>333</sup> Article 58(2) ACHPR.

<sup>334</sup> Sokwanele, Civic Action Support, available at

<http://www.sokwanele.com/thisiszimbabwe/archives/8254> accessed on 27 of January 2013.

Procedurally, the Commission may, after considering a matter before it, make recommendations as it deem useful to the Assembly.<sup>335</sup> However, the communications made by the commission relate only to cases 'of a series of serious or massive violations of human and people's rights'.<sup>336</sup> The Commission, after making some consideration, shall draw the attention of the Assembly to the latter cases<sup>337</sup> and the Assembly may then request the Commission to undertake a study and generate a factual report with findings and recommendations.<sup>338</sup>

The primary purpose of the African Commission is to promote human and peoples' rights<sup>339</sup> and in particular to co-operate with other African and international institutions concerned with the promotion and protection of human and peoples' rights<sup>340</sup> and to interpret all the provisions of the present Charter at the request of a state party, an institution of the Organization of African Unity or an African organisation recognised by the Organization of African Unity.<sup>341</sup> Furthermore, the Commission is not a substitute for the domestic courts; the commission can only decide on the matters brought before it and when doing so it should ensure that all local remedies, if they exist, have been exhausted, unless it is clear to the commission that to follow appropriate procedures would unduly prolong the achievement of a remedy.<sup>342</sup> More so, the Commission should draw its inspiration from international law on human and peoples' rights, more particularly from the provision of different African instruments on human and peoples' rights, the Charter of the United Nations, the Charter of the Organization of African Unity, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of human and peoples' rights, as well as from the provisions of various instruments adopted within the specialised agencies of the United Nations of which the parties to the present Charter are members.<sup>343</sup>

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<sup>335</sup> Article 53 ACHPR.

<sup>336</sup> Article 58 ACHPR.

<sup>337</sup> Ibid.

<sup>338</sup> Article 58(2) ACHPR.

<sup>339</sup> Article 45(1) ACHPR.

<sup>340</sup> Article 45(1) (b) ACHPR.

<sup>341</sup> Article 45(1) (3) ACHPR.

<sup>342</sup> Article 50 ACHPR.

<sup>343</sup> Article 60 ACHPR.



The African Commission can refer a case to the African Court on Human and Peoples' Rights (ACHPR) at any time during its proceedings in relation to those countries that have ratified the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights ('the Protocol Establishing the Court').<sup>344</sup> While the African Commission has jurisdiction over all states which have ratified the African Charter, the ACHPRs only has jurisdiction over those African states which have — in addition — ratified the Protocol Establishing the Court.<sup>345</sup> So although the ACHPRs have the power to make binding decisions,<sup>346</sup> there are few states subjected to its jurisdiction as compared to those who are members of the African Commission.<sup>347</sup>

Therefore, it is clear that the two bodies; the commission and the ACHPRs, have an important role to play on the African continent, more especially in the southern part of the continent where the SADC Tribunal is dysfunctional. Furthermore, the Commission, state parties and African Intergovernmental Organisations are entitled to submit cases before the Court<sup>348</sup> all in pursuit of the protection of human rights and the rule of law. Although other matters concerning trade and security may not be brought before these two bodies, it is encouraging that human rights violations still have an alternative platform on which they can be addressed. Therefore, this implies that the fact that the farmers brought the case to the African Commission may result in adjudication by the ACHPR since. The AC may refer a case to the ACHPRs. Furthermore, this is an indication that African Commission and the ACHPRs may act as members of the global network of courts which may be relied upon in order to strengthen human rights and ultimately the goal of regional integration in Africa.

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<sup>344</sup> This Protocol (Merger Protocol) created the African Court of Justice and Human Rights, which incorporates the already established African Court on Human and Peoples' Rights. This Court will have two chambers; one for general legal matters and the other for rulings on the human rights treaties.

<sup>345</sup> See Protocol on the African Charter on Human and Peoples Rights on the Establishment of an African Court on Human and Peoples' Rights ('Protocol on the Establishment of the Court'), arts 5 and 34 <[www.up.ac.za/chr](http://www.up.ac.za/chr)> accessed 12 January 2014? (ACHPR Protocol).

<sup>346</sup> Article 30 ACHPR Protocol.

<sup>347</sup> E de Wet, op cit (n191) at 4.

<sup>348</sup> Article 5(1) ACHPR Protocol.

## V Conclusion

It has been established that the suspension of the Tribunal is unlawful, ultra vires and a gross violation of the right of access to justice. It is inconceivable for SADC to operate efficiently without the Tribunal. In essence, what it means is that most of the SADC instruments will not be legally enforceable as long as the suspension of the Tribunal is still in place. Furthermore, Bartels in his report, found the Tribunal to be a legitimate court which has the necessary jurisdiction and capacity to make binding decisions on issues covered in the Treaty. He also confirmed its jurisdiction on matters which concern human rights, democracy and the rule of law and that its decisions are enforceable within the domestic courts. It is therefore a plausible conclusion that the findings made by the Tribunal in the case of Campbell was wholly correct and that Zimbabwe's conduct was reprehensible and unacceptable for the Community based on law. Be that as it may, it is my opinion that, in order to serve the interest of justice and the agenda of integration from being threatened; the suspension of the Tribunal should be lifted as soon as possible. The next chapter will however provide recommendations and a conclusion.

## CHAPTER FIVE: RECOMMENDATIONS AND CONCLUSION

### I INTRODUCTION

The research has extensively discussed and analysed various aspects of the Tribunal and presented it as an important judicial institution of the SADC region. In doing so, the jurisdiction of the Tribunal, the enforcement of Tribunal decisions, instruments governing the power of the Tribunal and the individual's *locus standi* before the Tribunal, are some of the aspects discussed in chapter two.

Secondly the *Campbell* case, being a famous and first case before the Tribunal which involved a human rights violation by the Zimbabwean government, has been discussed and analysed in chapter three. The Tribunal ruled against Zimbabwe and found in favour of the applicants. The Tribunal stated among other reasons that the compulsory acquisition of agricultural land without compensation as provided by Amendment 17 of the Zimbabwean Constitution<sup>349</sup> was a violation of the Treaty's basic principles to respect and protect human rights. More so, the Tribunal also found that, Amendment 17 violated Article 6(2) of the SADC Treaty<sup>350</sup> which prohibits discrimination on any grounds including race, as it has been proved that the Amendment 17 was designed to target white owned farms only. Hence the Tribunal ordered Zimbabwe not to continue with land grabs and to compensate those whose farms had already been confiscated.

The discussion in previous chapters also indicated Zimbabwe's refusal to enforce the decision of the Tribunal. The decision of the Tribunal against Zimbabwe signalled the demise of the regional court as the political leaders of SADC member states colluded to suspend the Tribunal in 2011. The suspension of the Tribunal is discussed in chapter four of this dissertation. After a *de facto* suspension of the Tribunal, an independent review on the Tribunal was commissioned which had to recommend on the terms of reference of the Tribunal. The study, headed by Lorend Bartels from Cambridge University, concluded that the Tribunal is properly constituted and its decisions are binding and valid. Subsequently, the farmers brought the case to the AU for its consideration. It is possible that the AU

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<sup>349</sup> Section 16B, Amendment 17.

<sup>350</sup> SADC Treaty.

Commission may refer it to the ACHPRs. Thus, the saga may continue on the regional level and may provide interesting perspectives on the relationship between RECs and the AU in Africa. Therefore, it is the primary purpose of this chapter to provide recommendations in relation to the issues raised by previous chapters in order to ensure that the impasse concerning the Tribunal maybe resolved.

## II Recommendations

### a) Sovereignty

The discussion in chapter 3 indicated that the Member States of the SADC are unwilling to relinquish some of their sovereignty to the sub-regional organisation. However, it should be stressed that the SADC organisation has been established by the sovereign governments of its member states. It is this expression of sovereignty that made the SADC a reality. Therefore using sovereignty as a tool to dishonour regional legal obligation is erroneous and it is not convincing in the legal sense.

In fact, as discussed in the previous chapter, the word “sovereignty” is a complex, but not absolute concept. Sovereignty does not only accord states with rights but also implies obligations as required by international law.<sup>351</sup> It is not the purpose of this section to discuss sovereignty entirely, however it is important to point out that; acceptance of almost any treaty involves a transfer of a certain amount of decision-making authority away from states, and towards some international institution.<sup>352</sup>

SADC member states should realise that sovereignty should not be abused in order to excuse non-compliance with international law obligations. More so, member states should not be allowed to invoke their national law or constitution as a justification for not respecting their international obligations. Acceding to the SADC treaty implies that member states incur international law obligations which will mould their sovereignty.

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<sup>351</sup> Sutherland Peter, J Bhagwati, K Botchwey, N FitzGerald, K Hamada, JH Jackson, C Lafer & T de Montbrial. ‘The future of the WTO: Addressing institutional challenges in the new millennium’ (2004) WORLD TRADE ORGANISATION, para 109.

<sup>352</sup> Ibid.

b) Member State to embrace the political will to enforce the Tribunal Decisions

Chapter three discussed political will as one of the wanting attributes of the SADC leaders as they are not prepared to both implement and respect the obligations placed upon them by the Treaty. However, the Treaty does provide for sanctions against members that ‘persistently fail, without good reason, to fulfil obligations assumed under this Treaty’,<sup>353</sup> or when they ‘implement policies which undermine the principles and objectives of SADC’.<sup>354</sup> The Zimbabwe saga and that country’s failure to comply with the SADC Tribunal’s rulings on its human rights violations have revealed the weakness in this arrangement.<sup>355</sup> The Summit was not prepared to act against Zimbabwe; instead, it decided to appoint a consultant to investigate the jurisdiction and terms of reference of the SADC Tribunal. Consequently the functioning of the Tribunal has been suspended and the terms of the judges (members of the Tribunal) have not been renewed.<sup>356</sup>

It is apparent that there is no political will to enforce the provisions for sanctions against members who violate their obligations under the Treaty. However, unless provided otherwise in the Treaty, summit decisions are taken by consensus,<sup>357</sup> giving the member in violation of its obligations a veto over any sanctions. This is a major flaw in the system. Furthermore, it has been proved that the real problem does not lie in the provisions of the Treaty; but it is the subsequent unwillingness of member states to respect the applicable legal instruments and to comply with obligations. The political will to comply with SADC law is absent. Therefore, it is my recommendation that sanctions should be stipulated in the Treaty and they

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<sup>353</sup> Article 33(1) (a) SADC Treaty.

<sup>354</sup> Article 33(1) SADC Treaty.

<sup>355</sup> Erasmus *op cit* (n282) at 6.

<sup>356</sup> These decisions were taken at the Summit of 16–7 August 2010, held in Windhoek. The relevant part of the Summit decision reads as follows: “A study shall be undertaken and completed within six months of the Summit meeting of August 2010, to review the role and responsibilities of the Tribunal. The Committee of Ministers of Justice/Attorneys General shall involve Members of the SADC Tribunal in the study; and the outcome of the study shall be presented by the Committee of Ministers of Justice/Attorneys General at an Extraordinary Summit”. The specific terms of reference for this study were subsequently formulated by the Secretariat and also included indications to make proposals on how to strengthen the Tribunal.

<sup>357</sup> Article 10 SADC Treaty.

should not be taken by consensus. Furthermore, states should not adopt instruments if they do not have the political will and intention to comply.

c) Reinstating the Tribunal with its Jurisdiction on Individual Locus standi

Chapter three of this dissertation has extensively discussed the jurisdiction of the Tribunal and the individual's locus standi before the Tribunal. It also discussed both the scope and the basis of the Tribunal's jurisdiction where it demonstrated that the Tribunal has jurisdiction over disputes between member states and between natural or legal persons and member states. These provisions indicate a strong desire by the Protocol to offer individuals an opportunity to access the Tribunal on the condition that they have exhausted all other local remedies.

However, recently the SADC Summit for Heads of State and government met in Lilongwe Malawi on the 18th of August 2012 to discuss, inter alia, the future of SADC Tribunal which was *de facto* suspended in 2010 following its groundbreaking ruling against Zimbabwe in a matter involving human rights violations. The Summit report indicated that it has approved the extension of the mandate of the Ministers of Justice /Attorney Generals to enable them to revise the Protocol on the Tribunal in order to address the concerns raised by the Council of Ministers. What is disheartening though in this report is that the new negotiated Protocol on the Tribunal has a limited mandate which is only confined to the interpretation of the SADC Treaty and Protocols relating to disputes between Member States.<sup>358</sup> This is fundamentally erroneous and legally wrong for such a decision is in breach of the SADC international legal obligation to uphold the rule of law, democracy and human rights. It is also contrary to the SADC pledge to involve its citizens in participation in regional matters. This decision has curtailed the individual right to access the Tribunal despite the fact that all claims ever brought before the Tribunal have been brought by natural persons against either the States or the SADC itself.<sup>359</sup>

It is therefore my recommendation that the Tribunal should be reinstated immediately and if possible it must also still maintain its mandate to protect human

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<sup>358</sup> Final Communiqué of the 32nd Summit of SADC Heads of State and Government Maputo, Mozambique August 18, 2012.

<sup>359</sup> E de Wet op cit (n191) at 14.

rights in the region. Judges of the Tribunal must be re-appointed immediately. The question still remains, should the *locus standi* be preserved? This is highly improbable since the Summit resolved to exclude individual *locus standi*.<sup>360</sup> However, it may be possible if other internal bodies like the ACHPRs intervene by way of giving an advisory opinion against such a move since the court is vested with the power to do so.<sup>361</sup>

### III CONCLUDING REMARKS

The pertinent questions in the SADC region are not about the formal legal dimension or provisions of the Treaty; it is mostly about poor implementation, lack of political will, relentless clinging to traditional sovereignty and insufficient monitoring of compliance. Furthermore, the analysis indicated an intricate misunderstanding of the basic legal consequences of the SADC Treaty among its members, and their apparent disrespect for legal obligations on a regional and international level. Though the conduct may be as a result of capacity deficits in Member States in relation to international law, it also suffices to hold that it is also a consequence of endemic disregard for the rule of law and democracy as such.<sup>362</sup> As a matter of fact, the major pillar for dispute settlement in Southern Africa has been rendered inoperable, it may not at the moment entertain any type of disputes, whereas there are limited alternative avenues for dispute settlement available; the ACHPRs for instance.

If the latter shortcomings require immediate resolve, it is not too late for the fifteen member state of SADC to indicate their commitment to SADC law and to develop a political will required for the objective of regional integration to be achieved. Preserving the status quo concerning the Tribunal will hamper regional integration and the much needed sustainable development of the people of Southern Africa.

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<sup>360</sup> Final Communiqué op cit (n222).

<sup>361</sup> Op cit (n315) Art. 4 of the SADC Protocol.

<sup>362</sup> O Ruppel and F Bangwamwabo, 'The SADC Tribunal: A Legal Analysis of Its Mandate and Role in Regional Integration' (2007) *MONITORING REGIONAL INTEGRATION IN SOUTHERN AFRICA YEARBOOK* 187 at 215.

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